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ABSTRACT

The speeches in this compilation cover a variety of topics of contemporary interest. The authors discuss legislative and case law concerning copyrights, student rights, minors' rights, extraccuricular activities, eminent domain, race relations, and employer-employee relations. (JF)

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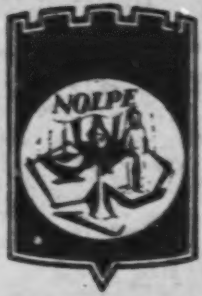

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NOLPE CONFERENCE PROCEEDINGS

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COPYRIGHT LAW AND EDUCATION

By

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The copyright law is a legal "sleeper" in the field of school law. It has a vital impact on the educational process, but is often unknown to those whom it affects, even when it subjects them to heavy financial liabilities and penalties.

It is a Federal law; constitutionally, it pre-empts state law. And, until recently, those who dealt with the copyright law rarely, if ever, thought of its impact upon schools. It is highly technical, and is almost invariable involved with conflicts between competing commercial interests.

The copyright law affects the educational process in at least three ways:

I. TEACHERS - - are affected in two ways:

(a) as authors of copyright works - - they want maximum protection;

(b) as users of copyrighted works - - they want the greatest possible freedom of use of copyrighted works without legal or administrative limitations.

II. SCHOOL BOARDS - - have many-faceted stakes:

(a) as purchasers of instructional materials - - costs are affected by royalties;

(b) as curriculum approvers - - their plans may be affected by copyright limitations on all sorts of curriculum material;

(c) as employers - - especially in connection with copyright on works prepared by their employees within the scope of their duties.

III. STUDENTS are affected as users in the learning process.

Let's be specific. Just what are we talking about?

Example one

The following is an excerpt from the forthcoming NEA JOURNAL for December, as an example of a technique to make homework interesting and meaningful:

> "High School: The class was assigned to watch a 'discovery' program on TV that dealt with a subject we were studing. I tape recorded the audio portion of the broadcast. The next day we listened to the tape in class and used it to ignite a lively and intensive discussion of the subject. Thus we were able to make full use of a professional presentation costing many thousands of dollars and involving many highly talented people."

Query, what are the copyright implications?

Example Two

Take a map in a Sunday Newspaper Supplement or Magazine, a map perhaps of newly emerging countries of Africa. What does a teacher do with the map in school? Here are eight good possibilities:

(1) She displays the original on the bulletin board.

(2) She projects the original on an opaque projector. There is no permanent, tangible copy. There is no problem under copyright.

(3) She makes a transparency for overhead projection.

(4) She makes it into a slide for a slide projector. This raises very serious problems under present law. The Register of Copyrights says, "NO, one cannot copy an entire work."

(5) She makes 30 copies on an instant fluid duplicator to supply one copy for each student in one class.

(6) She makes 100 copies on an off-set duplicator for members of three classes. Under present law, this would be allegedly illegal as copying an entire work.

(7) She displays the original on ITV. Here there would be no problem.

(8) She tapes for delayed broadcast, closed circuit, one station. Under present law, its legality would be terribly uncertain.

Example Three

A poem is to be used on an examination for analysis.

At one time the attorney for the Authors League said, "Do this, and I'll sue for infringement." After a long period of Congressional hearings and lengthy clamor, this was retracted. Under the new proposed bill, according to the House Report, such use would be acceptable.

Other Examples of what teachers do with copyrighted materials:

(1) An elementary school teacher makes photocopies of a short story from a supermarket magazine for use in choral reading.

(2) A physical education teacher dittoes a digest of rules from an official rule book.

(3) A science teacher makes class copies of an excerpt from a school library reference book to be used immediately.

(4) A music teacher tapes his high school orchestra performance for self-evaluation purposes.

(5) An English teacher mimeographs several short poems by poets represented very superficially in an anthology which is used as a text by the students.

(6) A social science teacher tapes a radio-TV debate for class discussion the following morning.

Here's what we're talking about. This is creative teaching.

CAN GOOD AND REASONABLE TEACHING PRACTICE BE ILLEGAL COPYRIGHT PRACTICE?

For years many of these and other good teaching practices have been in widespread use, and scarcely anyone thought of the copyright angles. But now that the issue has been raised, many school boards and supervisors fear that the failure to assure the legality of basically sound and reasonable teaching practices will curtail and handicap creative and imaginative teaching seriously. Such reasonable practices have grown up over the years under existing copyright law, and both education and copyright proprietors have prospered. The problem facing the Congress today is the need to legitimitize reasonable educational practices so that teachers won't be forced either to drop them, to the detriment of the pupils, or to continue them "under the table."

That this will also be to the advantage of copyright owners is attested by the fact that while these educational practices grew up, America's publishers have prospered as perhaps never before in history. Their stocks are among today's "hot items" in the market —and this despite, or perhaps because of, the very educational practices we are discussing.

CURRENT STATUS OF LEGISLATION

1. After years of study by the Copyright Office and extensive hearings by the House Judiciary Committee, the House passed H.R.2512, to enact a general revision of the 1909 copyright law.
2. The Senate Judiciary Committee has completed hearings on S.597, but has deferred action until next year.
3. The major educational organizations of the U.S. have organized an Ad Hoc Committee on Copyright Law Revision, comprised of some 35 organizations: National Education Association, American Council on Education, National Catholic Education Association, National School Board Association, and subject-matter associations such as Language, English, Science, Classroom Teachers, ETV, audiovisual groups, etc. The committee has served as a coordinating group to develop educational consensus in the nation.

BASIC ISSUES

The copyright law involves a whole host of issues of public policy, some of which have specific relevance to education. Of these, I have selected only three to discuss this evening:

I. THE NEED TO MAKE LIMITED COPIES FOR NONPROFIT EDUCATIONAL USE.

II. THE NEED FOR REASONABLE USE OF NEW EDUCATIONAL TECHNOLOGIES.

III. THE NEED FOR REASONABLE ACCESS TO COPYRIGHT MATERIALS.

I. THE NEED TO MAKE LIMITED COPIES FOR NONPROFIT EDUCATIONAL USE.

Since 1909 the copyright law has contained the "not-for-profit" principle, authorizing the nonprofit public performance of nondramatic literary and musical copyrighted works without regard to consent from the copyright owner.

The current bills would destroy this basic doctrine, and substitute categorical exemptions. I believe this to be an unwholesome retrogression contrary to public interest. On this score, the present law is sensitive to the public interest in its broadest reach, by distinguishing between nonprofit and commercial uses of copyrighted materials; it recognizes a special and primary right for such nonprofit uses. The new bill rejects this concept and lumps together nonprofit and commercial, subject to a back-handed partial exemption. This failure to make the vital initial distinction between nonprofit and commercial users is, I submit, a serious blind-spot in the current bills.

The Ad Hoc Committee proposed a two-pronged approach:

(1) retention of the "not-for-profit" concept for nonprofit educational use, and

(2) application of the concept to both (a) performance and (b) restricted copying and recording, for nonprofit educational purposes.

To this end, the Ad Hoc Committee proposed a special statutory provision for limited educational copies and recording, as well as a statutory "fair use" section. This double proposal would, in my judgment, be the simplest, fairest and best way to deal with education's needs under the copyright law.

However, the Ad Hoc Committee agreed to compromise position, in order to achieve the same general result in a different way, through

(1) a revised and somewhat more specific statutory "fair use" section, and

(2) a legislative history by means of a Committee report sanctioning approved educational practices under the copyright law.

As we interpret Section 107 (the fair use section) of the House bill and its legislative history on "fair use," the bill gives classroom teachers the statutory right to make limited copies and recordings of copyrighted materials for teaching, research and scholarship. This right includes both single and multiple copies in appropriate instances, as well as some types of entire works under very limited conditions, as shown in the House Committee report. In addition, certain similar rights are provided for broadcast teachers.

I must frankly admit that I am not too happy with the "fair use" approach. It is—under present law— (1) uncertain, (2) after the fact, and (3) costly. Please remember that "fair use" has customarily been an affirmative defense in an infringement suit. There is a paucity of judicial precedent specifically applicable to educational and other nonprofit "fair use." Consequently, under present law, there is such great uncertainty and unpredictability in determination of "fair use" that teachers would need a "hot line" to a copyright lawyer before they could tell when a use is "fair" or otherwise. For example, publishers objected to a statement proposed by the Register of Copyrights that a clear-cut example of fair use was

> "Reproduction by a teacher or student of a part of a work to illustrate a lesson."

The American Book Publishers Council said it could only be "a small part." In testimony before the Congress, the General Counsel of the Copyright Office said it could only be "a relatively small part," and the Register's Supplemental Report says that "fair use" applies only to "the relative insignificance of the excerpt copied." The Music Publishers Association of the U.S. said that fair use can not apply to "any part."

Add to this the testimony of counsel for the American Textbook Publishers Institute that "The doctrine of fair use was never intended to afford certainty of the law."

Various Federal agencies have submitted reports, or testimony, which also substantiate the folly of attempting to rely on "fair use" under present law in terms of the predictable right to copyright material.

The Federal Communication Commission's report on an earlier bill, states, in part:

> "However, we are also mindful that "fair use" is both a limited and an indefinite doctrine. . .Further, there is no precise way of knowing how much of a copyrighted work can be used in a given situation under the doctrine of fair use. The prospective user would apparently need expert advice to judge each case individually under the provisions. . ., and, even so, there would be the risk of having to defend an infringement suit. . .we are therefore of the opinion that the doctrine of 'fair use' would not in and of itself, be an adequate answer for educational broadcasting purposes."

The Health, Education and Welfare Department's report on H. R. 4347 says, in part:

> "1. With no reported judicial decisions on the subject, it would be useful to libraries, authors, publishers, scientists, and researches to have the permissible limits of photocopying spelled out in the statute.
>
> "2. The failure of a comprehensive revision of the Copyright Law to include a provision on photocopying might be deemed to indicate an intent by Congress not to authorize photocopying by libraries as a limitation on the exclusive rights of a copyright holder."

In the light of the voluminous testimony and heated controversy on the uncertainties of "fair use" for educational purposes under the present law, the House Judiciary Committee's report specifically recognized "the need for greater certainty and protection for teachers," especially "as to cases of copying by teachers, since in this area there are few if any judicial guidelines" (p.32). In adopting the compromise agreement as to "fair use," the Report specifically states:

> "The committee sympathizes with the argument that a teacher should not be prevented by uncertainty from doing things that he is legally entitled to do and that improve the quality of his teaching" (p32).

Therefore, the Report is designed to

> "provide educators with the basis for establishing workable practices and policies." (p.33)

Consequently, in the light of the entire legislative controversy and history, I believe that the real import of the House bill and report on the "fair use" doctrine, in adoption of the compromise agreement, is that it is being given a statutory and Congressional infusion of positive doctrine where prior judicial gaps prevailed, and that the key is a Congressionally-adopted public policy of special recognition for nonprofit educational uses. As I see it, the effect of the House bill and report, taken together, is to write into statute the basic position (although not necessarily all the specifics) espoused by the Ad Hoc Committee in connection with its proposed statutory authorization for limited educational copying and recording.

On this score, it is important to state our understanding of the fundamental nature of fair use as it is encompassed on this bill:

(1) Fair use, and the limited educational copying and recording it specifically authorizes in statute, is not an occasional or only casual right. In our agreement on fair use, there is nothing occasional or casual about education's right of fair use under the statute. Instead of occasional, it is a constant right; instead of casual, it is a continuing right.

For us, "fair use" is a fundamental and permanent statutory charter for education. Such use is not given by leave of the copyright owner, but is specifically and statutorily reserved for education by Congress and the copyright monopoly. It is not a privilege awarded by the publisher, but a right specified by law.

(2) One witness was candid enough to state that he regarded fair use "as a temporary safety valve" after which "the concept of fair use should lose its importance and die off as some form of vestigial tail." If this is true, we want nothing of such phoney "fair use."

As indicated earlier, education proposed a two-prong approach, retention of the "not for profit" concept plus a statutory authorization for limited copying for educational purposes. We receded from this position and accepted a compromise involving a rewritten fair use provision and a clear legislative history only upon the basis of the iron-found congressional assurance that

> "the doctrine of fair use, as properly applied, is broad enough to permit reasonable educational use." (p.32)

If there is a breech in the agreement as the Ad Hoc Committee understands it, either in terms of the statutory language or the legislative history, the Ad Hoc Committee's position remains as originally stated. I repeat: The compromise was based on the assurance of a lasting charter in the fair use provisions and a legislative history protecting the right of teachers to teach effectively, including the statutory right of limited copying and recording.

Furthermore, there is one statement in the House Report which negates the compromise agreement, so far as we are concerned. Section 107 of the bill, on fair use, sets forth four of the criteria which may be used for determining "fair use." Our basic understanding of the agreement is correctly stated in that Report's comments that the fourth criterion "must always be judged in conjunction with the other three criteria," and that the four criteria "must be applied in combination with the circumstances pertaining to other criteria." However, these statements—and the essence of our agreement—are, we fear, wholly vitiated by another statement in the House Report dealing with the fourth criterion, as follows:

The Board of Education, on October 19, 1965, adopted a resolution, pursuant to the Winton Act (Ed. Code § 13080 to 13088, added by Calif. Stats. 1965, Chap. 2041, effective September 17, 1965).

The resolution established a negotiating council of nine members "allotted proportionately according to an election of the certificated staff, to represent organizations of certificated staff members in negotiations * * *" (254 A.C.A. 706, 711.)

On October 22, 1965, the Association filed its complaint alleging that the election procedure violated the Winton Act, and the Federation intervened. The preliminary injunction was issued on December 31, 1965, and the permanent injunction on April 29, 1966.

A brief legislative background of the Winton Act is necessary to an understanding of the Berkeley Teachers Association case.

In 1961, the California Legislature enacted Government Code §§ 3500 to 3509 (Calif. Stats. 1961, Chap. 1964) to provide a uniform basis for recognizing the right of all public governmental employees, coming within the control of the California Legislature, to join and be represented in their employer-employee relations by public employee organizations, or not to join any such organization and to represent themselves individually in their employer-employee relations. School Districts and their employees and employee organizations were expressly covered by this 1961 statute.

By the 1965 Winton Act, the California Legislature removed school districts, and their employees and employee organizations, both certificated and classified, from the scope and operation of the 1961 statute (Govt. Code §3501) and established unique provisions for them (§§ 13080-13088, Ed.Code.)

This 1965 Winton Act defined "public school employer" to include, among others, a public school district * (§ 13081, subd (b), Ed. Code); defined "public school employee" to mean any person employed by any public school employer except those persons elected by popular vote or appointed by the Governor. (§ 13081, subd. (c), Ed. Code.)

§ 13081, subdivision (a), states"'Employee organization' means any organization which includes employees of a public school employer /e.g., school district/ and which has as one of its primary purposes representing such employees in their relations with that public school employer."

§ 13085 provides for a "negotiating council" of from five to nine members composed of representatives, in proportions determined by formula, of those employee organizations which (1) represent their members who are certificated employees employed by the school district and (2) have as one of their primary purposes representing such employees in their relations with that district.

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* "Public school employer" also includes a county superintendent of schools, a county board of education, and a classified-employee personnel commission.

The Negotiating Council is established in a school district in the event there is in that school district more than one employee organization representing certificated employees of the district.

It should be noted that, late in the course of legislative deliberation, four passages in § 13085 were changed by the Legislature from "negotiate in good faith" (which was defined) to "meet and confer." (Assembly Bill 1474 as amended in Senate on June 10, 1965.)

In the Berkeley Teachers Association case, the California Appellate Court states the purposes of the 1965 Winton Act as follows (254 A.C.A. 708, 711-712 and 714-715):

"The statement of purposes of the 1965 Legislation emphasized the right of public school employees to join organizations of their own choice and be represented by such organizations not only in their employment but also in their professional relationships with their employers and to afford them a voice in the formulation of educational policy. Like its 1961 predecessor, the Winton Act was designed to strengthen existing tenure, merit or civil service systems and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public school employers by which they are employed (Ed. Code, § 13080; cf. Gov.Code, § 3500). * * * (Pages 711-712)

"The final portion of the statute, section 13088 (paralleling § 3509, Gov. Code), provides that its enactment shall not be construed to make section 923[5] of the Labor Code applicable. Both of the courts below apparently concluded that the allotment proportionately of the nine members of the negotiating council by means of an election, participated in by all of the District's certificated employees and in which they are called upon to choose between employee organizations, was not in accord with the intent and purpose of the Winton Act, and was contrary to the express provisions of section 13085 (quoted above) that the members of the negotiating council be selected by the employee organizations representing certificated employees." (Pages 714-715)

The Appellate Court's decision is epitomized by the following (254 A.C.A. 708, 715-716):

"The Board's resolution provides that all of the District's certificated employees, irrespective of whether or not they are members of an employee organization, may participate in an election for the purpose of determining which organization each employee wishes to represent him on the negotiating council. However, as indicated above, section 13085 does not provide for a negotiating council to represent all certificated employees of the District, but a negotiating council composed of representatives of those employee organizations entitled to be represented on the negotiating

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[5] The section states that the public policy of the state recognized the right of individual workmen to advance their interests by organization and favors collective bargaining (American Radio Assn. v. Superior Court, 237 Cal.App.2d 891 [47 Cal. Rptr. 419]; Chavez v. Sargent, 52 Cal.2d 162 [339 P.2d 801]).

The Department of Justice has opposed extension of the term beyond 56 years, as an unwarranted monopoly:

> "The Department of Justice is opposed to lengthening the period of copyrights. Copyrights (and patents) are forms of monopolies and should not be extended for periods longer than those now provided by law. The present 56-year monopoly granted to authors is in our view fully adequate to reward authors for their contributions to society. Considering this matter from the viewpoint of the public, which is interested in the early passing of copyrighted material into the public domain, it would seem unwise to extend further the copyright monopoly."*

CONCLUSION

In conclusion, I respectfully suggest that there are at least three fundamental principles that should be determinative in consideration of copyright legislation:

First principle:

As former Attorney General Katzenbach told the Congress, "Copyrights are forms of monopolies." It is of the utmost importance to realize that

> "Even at its best, copyright necessarily involves the right to restrict as well as to monopolize the diffusion of knowledge."

Second principle:

The Constitution grants no property rights to authors; it merely grants power to Congress to enact copyright legislation. In Wheaton v. Peters, (1834) the very first case in which the Supreme Court considered this problem, the Court said:

> "Congress by this act, instead of sanctioning an existing right, as contended for, created it. (661). . .This right, as has been shown, does not exist at common law—it originated, if at all, under the Acts of Congress." (663) Wheaton v. Peters, 8 Pet.591 (1834)

The House Report on the current Copyright Law of 1909 also made this same point crystal clear:

> "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights. . . .The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best." House Report No. 2222, 60th Cong., 2d Sess., p.7

There is a long and uninterrupted line of cases that hold unequivocally that copyright protection is completely and solely a matter of statute, a privilege or franchise, simply a creature of statute. As distinguished from literary property, copyright is wholly a matter of Congressional discretion to grant or to withhold.

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* Letter of Acting Deputy Attorney General Katzenbach, May 2, 1962, House Rep. No. 1742, 87th Cong., 2d Sess., on H. J. Res. 676, p.6.

The Supreme Court has also held that the conditions upon which copyrights are granted are wholly within the constitutional power of the Congress to prescribe.

The Register of Copyright's Report of 1961 commented on this subject as follows:

> "Copyright. . .has certain features of property rights, personal rights and monopoly, but it differs from each of these. The legal principles usually applicable to property . . .are not always appropriate for copyright." (p.6)

Third principle

The Congress, the Supreme Court and the Register of Copyrights have all affirmed the primacy of the public interest over the copyright proprietor's interest"

(1) The House Report on the present law stated that copyright was given

> "not primarily for the benefit of the author,
> but primarily for the benefit of the public."
> House Rep. No. 222, 60th Cong., 2d Sess. p.7.

(2) The Supreme Court has said:

> ". . .the copyright law. . .makes a reward to
> the owner of secondary consideration."
> U.S. v. Paramount Pictures, Inc., 334 U.S.
> 131, 158 (1948).

(3) And the Register of Copyrights said, in his 1961 Report to the Congress:

> "Within limits the author's interest coincide with
> those of the public. Where they conflict, the
> public interest must prevail." (p.6)

Elsewhere this Report also says:

> "The needs of all groups must be taken into account.
> But these needs must also be weighed in the light
> of the paramount public interest." (p.xi)

I respectfully suggest that "the paramount public interest" in the U. S. is its system of public and private, nonprofit schools which reach into every home in every corner of the nation. This "public interest" must prevail in the new copyright law.

LEGAL RIGHTS OF STUDENTS IN THE SCHOOL SETTING

By

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By the time this talk appears in print, it will be a rare person who is not familiar with its subject, at secondhand at least. It well may become the most talked about topic since "new math" and may outrun the controversy over teacher walkouts. The subject deals with alleged invasions by governing boards and their deputies of the civil rights of students in public schools and colleges. The minds and feelings of some of the students apparently have been tampered with, all under the guise of maintaining necessary "law and order".

Legal literature and court cases in the area of the civil rights of students are at a bare minimum. With almost no so-called "landmark" cases to serve as a guide, maybe it is just too early for an analysis of what record there is. Even though detached appraisal is not now possible, the topic of the governing of schools and its effect on students must raise some rather serious questions about the preservation of individual dignity, the limits on the use of power by government, and interference by society of one's personal autonomy and belief.

THE FUNDAMENTAL THEME

The central point at issue developed herein is the infringement by government of the civil rights of students. The subject matter is the legality and propriety of regulations by educational institutions designed to control the behavior of those in attendance. The thread for maintaining continuity is the matter of the constitutional limits of the authority of such bodies to interfere with one's basic right to be left alone regarding his person and his thoughts.

There seems to be increasing concern over unrest and disobedience by students. This anxiety is reflected in the numerous rules adopted by the governing boards of schools and colleges to keep an environment conducive to study. Some of the policies adopted to this end has become so controversial and objectionable to some citizens as to trigger court litigation.

Posing the Question

The dilemma facing the courts involves the right of a student to be let alone even when under the supervision of a public educational agency versus the need of society --the public-- to be informed about the matters which concern the group.

Respect for the privacy of individuals in a world of increasing togetherness lies at the heart of the issue. The right to be let alone is undoubtedly the most intimate and personal concern of the many involving legal principles. For every violation of a person's privacy -- no matter how rational be the excuse -- is an indignity to the individual.[1]

Recency of the Privacy Concept

Privacy as a legal concept is one of the newest to come into the law of the United States.[2] It is still in doubt in some states but is gradually making its way. Even England — the basis for law in the United States — has yet in 1967 to enact legislation in this area in any way comparable to that of some of the United States.

The concept is new since only fairly sophisticated social groups have the concern and ability to nurture that subtle and personal possession of humans — their dignity. An interest in one's privacy surely can never have the strict protection of the law afforded to the possession of real estate, chattels and one's reputation.

Surely a crucial part of the democratic philosophy is the need to re-examine the attitude of many citizens toward freedom—or its reciprocal, the control by some of the behavior of others.[3] Privacy is distinctly a concept of the minority, like most of the legal landmarks.

School Applications

The fundamental theme has been delineated. However, specifics must follow. Many are the behavior patterns of students which some governing boards have deemed to be "unacceptable" on school premises as well as off. Dress and grooming, marriage, participation in societies and other non-school activities, and eligibility rules—all have been the bases for sufficiently conspicuous departures from the norm in accepted behavior as overt reactions to board authority. In other words, boards have seen reasonable relationships between rules involving long hair and tight pants and the operation of efficient systems of public education.

CIVIL RIGHTS AND STUDENT RECORD FOLDERS

It is natural for educational institutions to have facts and comments about students in their classes, in homerooms, in conferences, and in non-school programs. Perhaps no workers exchange more information about people than do those employed in education. The day has long since passed wherein teaching was solely instruction within a classroom.[4]

Bases for Privacy Invasions

The number and complexity of student records have increased markedly since Horace Mann's day of the *Daily Register*. Because of sloppy recording of information and careless release of data, school boards and individuals are getting into legal trouble. A tendency among school personnel has been to get careless, maintaining important records on a haphazard basis.

In the nosey environment of the office suites of educational institutions, each student runs the risk of being thrust into the public eye by an unwary employe. Specific aspects related to student records remain unfamiliar to many employes.[5]

Some do not know what matters are solely for the private concerns of student or family. Many folders contain a jumble of student achievement information interspersed with reports of grievances made by the student. Problems also arise due to failures of administrators to take needed initiative. Action is delayed since it then places no burden on them to follow through.

Teachers and school principals have occasion to make unfavorable statements relating to students in reports of conduct, reasons for school dismissal, and in replies to requests for recommendations from other schools or employment sources. The tort of defamation is the source of some litigation between students and school personnel. The editor of NOLPE's quarterly NEWSLETTER has called defamation an "unwary trap for school people."[6] He had little difficulty in finding examples of betrayals of confidence by school personnel. These could include talk from a school telephone about a child's mental test score or telling a curious bystander in the office about the failing grade in English John received on his report card. Or, a teacher might be asked by a colleague to relay information about John to a third party when this is clearly not his professional obligation.

No rule is better understood but more often broken than that which forbids gossip--oral and written. Information obtained in private--whether by means of counseling or consulting relationships--should be discussed only in the strictest professional setting with persons who have a demonstrable interest.

There is not much law about pupil records. When the searcher uses such words and phrases for his guide as "safe-guarding individuals" or "professional confidences", he finds no constitutional provisions save that of necessary substantive and procedural "due process". Also he fails to find significant statutes and few court cases. In looking into textbooks on school administration, the searcher finds little mention of the legal ramifications of divulging confidential materials which may be in folders. In a California case a court recognized that the "negligent release of a transcript" might well subject the school to a suit for the violation of the student's right of privacy.[7]

The day of the computer holds even greater problems in terms of protection of privacy because of the quantity of information which can be made available. The communications industry enables private industry and public enterprises to gather unprecedented mountains of stuff about people. Automatic cameras and recorders can be turned on when anyone enters a room or merely starts talking. College authorities can thus listen in on sounds in dormitory rooms. Gadgetry threatens the privacy of both smoking salon and bed chamber.

The Doctrine of Privilege

Public employes, when heedful and conscientious, are in almost no danger from infringing upon the civil rights of students because of legal protection afforded them in carrying out their responsibilities. Whether their communication be oral or written--if carried on in a bona fide professional setting--the law labels such utterances as "privileged" and therefore not open to litigation.[8]

A communication termed "confidential" describes only one made in secret. It does not embrace those made with the expectation of being disclosed.[9] It omits those made in the presence of third parties. A message is labeled "privileged" when made (1) in good faith, (2) upon subject matter in which the communicating party has an interest or to which he honestly believes he has a duty, and (3) designed to divulge matter which, without the occasion upon which it is made, would be defamatory.[10]

Statutes vary in their definition of "defamation". In substance these laws say that statements are defamatory which communicate to third persons the notion of diminished esteem of another and reduced respect in which the person is held. They excite adverse opinions about the person in the eyes of a substantial minority. It appears that this tort, then, is an invasion of a person's interest in his reputation by means of communications to others which tend to reduce the estimation others hold of the person.

"Qualified privilege" is used when absolute does not apply. This lesser status emphasizes that the defense of privilege--against an irate student or his parent--is conditional only. The protection may be lifted if the one who alleges injury can establish that the message was actuated by malice. As a consequence, a report from a school employe about a student, told or mailed to an interested party, is qualifiedly privileged, and the student has no recourse at law. This is so unless the comment was made in bad faith or for an improper purpose. The law weighs inconveniences and then attempts to balance them, holding that harm such statements occasionally do to others may be small indeed to the benefit society derives from getting frank reports.

Some states have extended the defense of qualified privilege to those volunteering certain kinds of information to prospective employers. It would seem wise that educators be protected when sending certain defamatory matter to physicians or admission officials or employers. Courts have held that libelous communications cannot be protected solely on the basis that the party making them had "friendly feelings" with those with whom the ideas were shared. If so, a wide door would be left open through which indiscriminate attack on persons could escape with impunity.

Legally Protected Materials

Following are examples of instances where protection was afforded employes who must share confidential materials. For "socially justifiable" reasons facts and records of students can be released upon inquiries from educational institutions, prospective employers, medical personnel, and government personnel. In releasing information about a student, the intent must be enlisting of aid from others about matters needing attention. A teacher may communicate with his principal about a student's markings on a lavatory wall with no fear of reprisal from the boy nor his family. The teacher and his principal may make honest errors in sending off data about students.[11]

Defamatory information about students can be discussed at meetings of school boards as well as in executive sessions. A New York court found a report from a principal to the school board to be qualifiedly privileged, in which was said that rumors about the plaintiff were being spread among the members of the student body and staff.[12] The general rules are that defamatory rumors and suspicions can be shared with interested third parties if the situation warrants a privilege. The Restatement of the Law (on Torts, S 602) admonishes that one is protected when he labels this type of message for what it is--rumor. In this way the communicator avoids misleading by not stating as fact what is only hearsay.

Governing boards have valid interest in receiving all types of information. They devise policy, and others have a duty to speak out to help mold it. Privilege obtains even though the comment is made at the Board meeting in the presence of citizens who just happen to attend. Because members of a PTA have a vital concern in the welfare of children, one court upheld at such a meeting a discussion of the moral conduct of pupils.[13]

Invasions of Privacy

In some instances school workers move beyond the veil of protection. A teacher exceeds legal privilege when he adds on the official register--after the plaintiff's name--that he was "ruined by tobacco and whiskey".[14] Where a statute prohibits release of "personal information" of students, the employe who does so at an open meeting about student discipline subjects himself to legal action.[15] So does the principal who includes comments in a memo about a student that are "spiteful" and can be recognized as producing ill-will toward him.

Any employe who engages in gossip--so called innocent or malicious--is inviting legal trouble. Whether it occurs at the bridge table or in school corridors or at church, the employe has abused the trust and confidence placed in him by students and other citizens. The school counselor, who permits or encourages cross-examination of himself about information given him by a student in confidence breaches an ethical responsibility if not legal duty. Unfortunately examples abound where the issue touches upon due process rights for minor plaintiffs.[16] In enough instances to warrant concern, administrators find so little about students in folders but much about the employe-writer. Facts are so interwoven with biases that deducing impartial judgments are well nigh impossible.

Guidelines for Educators

Before raising some of the yet "unanswered questions" regarding the use and misuse of student information, it remains to suggest guidelines which may help to avoid common pitfalls.

Because it is common practice for school personnel to remark to others about students, reminders follow of what constitutes behavior to avoid legal trouble. In oral exchange of information, the prime admonition is to speak freely with colleagues and those "others" who have a legitimate concern with the information. This is a basic legal right providing the necessary solid base to wholehearted performance of professional obligations.[17] In other words, the sharing of student information with those who require it is in the best interests of society. So, defamatory information may be released when made at proper times and places, with no fear of reprisal for being malicious.[18] Privilege does not depend upon the existence of facts which are not knowable to the person whose comments may be challenged. Such a person may legally publish information to those who reasonably appear to have the duty to act in the matter.

The law affords protection against liability for misinformation given in any forthright effort to protect and advance a justifiable interest of society. When the occasion is privileged, even the communication of suspicion and rumor is protected. Here a clear duty to repeat a rumor must be shown with the comment labeled as such.[19]

The school employe should speak within his bona fide role as a professional worker replying to questions put to him. He remains under the cloak of privilege as long as he avoids volunteering libelous words.

The second group of guidelines applies to cross-examination types of settings or where the issue is that of release of information to public or private investigators, and to law enforcement officials. In some jurisdictions the educator should maintain separate files for certain types of data, supervised by him, and not made a part of the "public" school record. In some states information about students may be released solely upon inquiry from investigators and the police, while in other states a court order is required for such release. When requests are made to school personnel in the furtherance of some governmental purpose, the propriety of releasing data is sanctioned by privilege. Acting in this manner, the employe avoids legal trouble even though he may be invading the privacy of some individual.[20]

Keep in mind that the school employe whose communication is privileged is authorized to keep that information from judge or jury--even in the face of a subpoena demanding disclosure.[21] But, this broad privilege is rarely conferred and then only to specially situated personnel who are themselves vehicles of broad social policy. (In truth, perhaps, few educators would fit this slot.)

The promise of confidentiality between student and teacher poses obstacles in formulating conduct guides. At the time of disclosure the promise of secrecy is understood. This obtains even without the legal recognition of privilege. However, the promise may be honored only until a dispute arises between a professional worker and student or his parents, or between a student and the state.[22]

The third or last category for guidelines is directed toward respecting the contents of student records. From even a casual glance at correspondence in open school files and from over-hearing bits and pieces of such records being discussed not too quietly over coffee, the conclusion follows that much unnecessary communication goes on within single buildings and in entire systems that lessens the dignity and privacy of students.

The doctrine of privilege suggests several legal and ethical criteria. The educator should act within the scope of his professional duties (as defined by statute and professional code of conduct) to avoid liability for damages in a civil action. Immunity of certain classes of persons from civil action for the tort of defamation has a rich heritage in the common law. The privilege thus conferred protects from liability (even when material is derogatory) so long as school employes and officers treat information confidentially.

Guides for action in terms of records can be formulated in more specific terms. The obvious all-pervasive rule is that the student should expect to have facts and other portions of his record released to those who have concerns about him. To avoid a breach of trust--if not actual legal embarrassment, the agent of government interprets "concern for the student" narrowly so as to include schools and colleges, employers, parents or legal guardians, and in some instances the student himself. Without proper revelation of "good cause" he will exclude the requests of individual school board members, any or all officers of so-called civic groups, or just plain inquisitive persons. The "gray area" where consumate discretion is called for--includes requests from governmental agencies, executives or individual legislators, the press corps, individual teachers or other professionals, such as medical doctors, mental health employes and social workers. One criterion for the educator is to ask whether those asking for student information are actually qualified to aid or work with the student and thus for whom the data would prove vital.

Almost no situation can be imagined where the educator could sanction communicating derogatory information about a student's record to miscellaneous school workers or to neighbors. Information contained in the record of a student must surely be shared solely with the student-depending upon his powers of awareness, his parents, with the school counselor, and with the school administrator whose duty it is to be informed.

In terms of inspection of a student's file by "the public", some courts have said that "all records kept by public officials are not public".[23] The private and confidential material in students' files must have restricted access due to the gamut of personal and intimate information therein. One of the "publics" is government. In Michigan all pupil files are exempted from court search. The attorney general has stated that school employes know better than he what constitutes a pupil record.[24]

In a nonlegal setting the student should expect protection and look primarily to the educator's professional integrity. Whether the statutes treat student-teacher or counselor communications as privileged is not the point here since neither the student nor any other person is present in such situations to check the statements made by another. Here also, as in the actual legal arena, justification for communication about a student which could defame him must rest upon the relationship of the parties, what the intent was, and whether the oral comment or the writing was made to support a private purpose or a larger public concern.

A remaining sub-topic under records and guidelines is that of the theory of "compelling duty" regarding information in a folder. Persons who release libelous communications about the record--and face court cases because of such publication--should have done so in the exercise of a clear legal or moral duty. A standard to be observed is that such person should stand in such relation to the student as to confer upon him legal right or impose a moral obligation to have written the communication containing disparaging remarks. Above all others educators owe a professional responsibility not to lower needlessly the approbation which students enjoy in the eyes of the community.[25]

There are times when silence on the part of a professional worker might be dangerous for the welfare of a student. The active intervention by a psychologist may be required when information, received in confidence, reveals a clear danger that a student under treatment might do harm to himself or others.[26] Matters involving the mental health of students should be shared with appropriate professional colleagues. All must avoid getting into predicaments which involve betraying a student or being disloyal to school administrators.

The legal or moral duty which compels the professional employe to observe guidelines extends to his intervention when he hears rumors spread about a student. The employe is obliged not to "stand by" where he observes student information being used in bad faith. He takes action but within the bounds of caution. He communicates as factually as he can to those who can tighten security and strengthen responsibility.

Some Unanswered Questions

The final category under "student records" raises some unanswered questions. Two are posed. Should a student or his counselor be given control over the non-educational uses to which his statements may be put? Is the student in need of professional help likely to be deterred from seeking it when he learns that his disclosures will be protected only until a demand is made for them in some school or court proceeding?

RULES PROMULGATED BY SCHOOL AUTHORITIES

In order to keep some semblance of order within this section of rules of governing boards that allegedly infringe upon the civil rights of students, the plan is to use the following four groupings: First Amendment issues concerning religious preferences, rules about dress and grooming, on-campus and off-campus regulations, and the suspension-expulsion vehicles.

About Religious Liberty

First Amendment problems customarily involve religious practices that modify or destroy the "neutrality" concept implicit within part of the Amendment. It has been these types of cases involving students which have come to the courts rather than those about freedom of association or expression. (Even though strictly a First Amendment issue, grooming is discussed in the next section.) The Commissioner of Education of New Jersey upheld the right of students, who were adherents of Islam and known as "Black Muslims", to refuse to join in the daily flag salute and pledge required by statute.[27] The statutes exempt from this type of daily exercise those "children who have conscientious scruples against such a pledge or salute". In Michigan the Federal District Court heard a case about the pledge of allegiance problem mixed with Bible reading.[28] In order to avoid interfering with the liberty of students, the Court said that schools had to avoid any indoctrination in ultimate values whether theistic or humanistic.

Students who object to religious exercises may be excused in Florida upon request while a federal court declared that the First Amendment prohibited Bible reading even when students were excused.[29] An Alabama court held that religious freedoms may be violated when a student was required to participate in physical education exercises in uniform but that mere attendance at a health class did not violate her constitutional guarantees of freedom.[30]

Dress and Grooming Regulations

Rules of governing boards about freedom of expression in terms of dress and grooming are among the most controversial facing such boards. It was clearly the issue of skirt shortness for girls and length of hair for the male students. The question to be settled was, "Which should be how long and on whom? To buttress the fact that "teen dress" is the priority concern for governing boards is the statistic that disputes over grooming rules in schools have reached the court level in many of the fifty states. Where the court stage has not been reached regarding grooming rules, local school boards are being forced to ponder the question of "how far above the knee is too far and how much below the ear is too long". This kind of preoccupation, assert some of the student petitioners (before boards of review), tends to foster rebellious and defiant attitudes which then incite student disobedience and misbehavior.

Court cases involving grooming regulations are legion. Before taking a look at some of these--and a closer look at grooming issues in the courts of Colorado and New Jersey, it is appropriate to recognize current attitude precipitating the litigation. Many local boards are now taking a "no-nonsense" approach to school unrest. Youngsters claim boards are bucking trends. Regulations concerning "what a student shall look like" while in school seem to excite some parents who speedily "exhaust the administrative remedies" open to them only to reach the courthouse door hastily for reasons known best to them. Adding fuel to the smoldering fires is the attitude of such militant groups as the American Civil Liberties Union. One of its spokesmen has said that dress and style of students are "forms of self-expression". He contended that putting meaningless restrictions upon students about grooming creates "an inhibiting atmosphere . . . not conducive to the assertion of new or different opinions". If it can be proved, goes this argument, that a certain hair style or mode of dress--in and of themselves--were detrimental to the student or to the morale of the student body, then a governing board would have justification to curb such practices. That such a view is not universal would seem obvious from the number of cases pending.[31]

Before contrasting the Colorado and New Jersey cases, "hair cases" in Texas and in Massachusetts show how close are the courts in their thinking. In Dallas a federal court ruled against the State Board in rendering judgment for the school district in a case where students sought to enjoin restrictions on Beatle-type haircuts.[32] It was contended by the plaintiffs that such rules in effect invade their right to privacy by regulating their appearance outside of school. Regarding hair, it was alleged, obviously it is not possible to have non-Beatle cuts desired by the board during school hours and then revert to long hair during the remainder of the day and night. Regulations pertaining to dress are quite different since a student might well wear board-approved attire during school hours and then shed these for other garb later on in the day.

In Massachusetts the Supreme Court sustained the power of the local school board to adopt the grooming rule under question, also ruling contrary to the State Board of Education.[33] The court pushed aside the student's challenge of the rule against unusual dress and appearance by saying that privacy must, in certain instances, give way to broader social aims.

Attention is called to New Jersey again where the State Board of Education held that local boards of education could not interfere with styles of dress and hair chosen by students. The Board stated that the admonitions by the local board against "extremes in hair length" and its encouragement of hair "neetly trimmed and in keeping with the general style of the time" were not issues of sufficient importance to the conduct of the public schools. It therefore did not see fit to embark upon any examination of the constitutional limits if the authority of governing boards to regulate the appearance or image of students.[34] In his appeal contesting the rule, the petitioner had argued that the rule had to fall as violative of the protection of freedom of expression guaranteed by the Constitution. The student claimed he had the right to be a "speckled bird" so long as he did not violate reasonable rules of health and morals.

This was not the position taken by authorities in Colorado where a court fight has been waged during much of 1967 over whether students may be sent home for violating board rules against mini-skirts, too long hair, and the wearing of knee-high Indian moccasins. Colorado law requires attendance of students at some school between the ages of seven and sixteen, permitting the "suspension or expulsion" of students on certain grounds. Appearance of students in schools is not a part of the statute.[35]

In the 1950's some high school girls were interested in "freedom of expression". They discovered that denim trousers—if sufficiently tight and narrow—could be as disconcerting to males as the clothing previously thought to be sole feminine attire. It takes little imagination to guess that boards responded almost in toto by requiring all girl students to wear skirts in the halls of learning. The legality of such orders were challenged then as is the broader issue of dress in 1967. In the 1930's tight-fitting sweaters on endowed female students, pulled over the uplift bra, caused some school officials to ban such distracting apparel since it had no place in the classroom. Alas, documents from that time attest to the fact of how difficult it was for boards of education to lay down rules to get boys to focus their attention upon geometric designs in math books.[36]

Almost universally, adults want boys to dress like boys while in school and desire that girls should look like girls. The problems remain of deciding which boys should be "the model" for other boys and if it is wise for all girls to look alike. For now at least, the consensus would appear to be that boards go beyond their authority when they adopt precise rules governing grooming. Outside the courts pressures are mounting which cast doubts upon such regulations that cut deeply into the matter of choices left open to students. Many of the rules are beyond the proper function of boards since no principle can be applied equitably and consistently, even within one school and much less within a whole system. With leadership from some state boards and some enlightened courts, it may be established before too long that male hair is no real obstacle to learning merely because the hair happens to be long. Historically, it has been students who were the innovators. It ought to be healthy that some students now and again ". . .test the mores of their elders".[37] The governing board should adopt policies to encourage teachers to guide and counsel students and shun any statement that smacks of First Amendment invasion of freedom of expression--whatever form it takes, if the matter is solely a private concern. That board is indeed wise that believes determination of modes of dress to be a sociological matter, best dealt with by the community at large, including the home and church. This provides encouragement for parents and school officials to establish rules jointly, thus discouraging style problems to get to the court test stage.

Campus and Off-Campus Regulations

The third grouping of problems under the broad topic of "rules promulgated by school authorities" is that of regulations aimed at controlling activities of students on the school grounds and also away from the campus. In reference to activities conducted "on school property", there would seem to be little legal controversy. However, the "arm band" case, now being litigated in Iowa, touches directly on the problem of freedom of expression during the regular school day. The Civil Liberties Union in that state is aiding in an appeal of a Federal District Court upholding a regulation under which school authorities in Des Moines suspended some students wearing arm bands to mourn the Vietnam war dead.[38]

Even though not at the court-level stage as yet, an in-school matter which could plunge boards into difficulty concerns the civil rights of students transported to public schools for the full school day from custodial institutions.[39] From reports some of the programs provided for such students fall far short of even a casually-defined "equal opportunity" level. In a New Jersey case parent petitioners charged that their son had not been provided with the type of special education program available to others which the state law required. Whether the rights of the child had indeed been violated was the issue. A city in Michigan was the site for an opinion of the attorney general about violation of the rights of a student during school hours. A local law enforcement officer, the petition alleged, had entered a public elementary school during the morning session, had walked past the principal's office, had questioned pupils as to the whereabouts of a certain pupil, and then sought out that pupil for questioning about a matter that had occurred away from the school premises.

By far it is the "away from campus" activity that brings student and board into legal trouble. Since the authority of the public school over students does not end with dismissal, the opportunity for alleged violation by boards of civil rights is indeed ample. No problem arises from enforcement of a rule that states students must go directly home. Quarrelsome conduct, profane language, and harrassment of shopkeepers can be controlled under this theory. But, what off-campus activities are strictly under the control of the board and which by parents? In what types of activities may students engage and still be under the surveillance of the board? One problem is that some boards have no definition of "out-of-class" activities. Therefore, it is difficult to know whether any part of the curriculum can legally be beyond the scope of such rules.

Since most state statutes ban affiliation in secret societies by students at the compulsory level, rules prohibiting membership come within the scope of board authority. The Ohio Court said that "reasonable enforcement" of a rule against self-perpetuating social clubs which meet away from school does not deprive persons as citizens or students of their constitutional rights or privileges.[40] From similar decisions, it appears that boards possess the authority to prohibit students from participating in certain activities outside of students' homes after school hours.

Students are considered not to be under the jurisdiction of the board and its rules during periods of summer vacation. A case from New York illustrates well how difficult it is for boards to attempt to govern student conduct outside of the legal school year.[41] Several students, suspended from a summer school session for behavior problems, sought reinstatement in a New York school. The five claimed that their suspension violated the state education statute. The court held that the provisions referred solely to the regular school year during which time attendance was indeed compulsory. No reinstatement could be in order since summer school activities are voluntary ones.

Rules of governing boards applying to conduct off school grounds include those directed at "controlling" the activities engaged in by married students. Courts have upheld the legality of regulations prohibiting the high school married student from engaging in school-sponsored nonclass types of activities. More and more, however, decisions have labeled such restrictions as unreasonable ones.[42]

From just partial analysis of court decisions it seems clear that the actual test of board authority over the behavior of students—whether involving constitutional guarantees or not—is the effect student conduct has on the efficiency and morale of the school rather than the time or the place of any "wrongdoing". In other words, the conduct of a student may legally be curtailed if the act of the student—who may happen to be away from the school premises after hours—is in fact detrimental to the good order of the institution and to the general welfare and advancement of all students attending the school. The attitude sustained by the courts appears to be this: there will be little respect for law and order until there is also respect for the rights of others. In the meantime, governing boards and their administrators will be at the "eye of the storm", the subject of intense controversy. This will continue to be so, not because they are responsible for the conditions with which they must deal but because, like the mountains, they are there.

Expulsion and Due Process Concept

The fourth and last grouping of issues under the "regulation" canopy pertains to the use by boards of the devices of suspension and expulsion of students from the public school they are legally entitled to attend because of residence. The twin tools are used to control the behavior of those who fall within compulsory age limits as well as those who attend public schools beyond such bounds. In almost all states suspension—and often followed by expulsion—of school age students from school is reserved by statute to the board of education and its authorized agents. There must be a deprivation of school privileges on proper grounds by the agency authorized to expel to be the basis for a lawful expulsion.[43]

All fifty state statutes provide for school attendance between certain ages, permitting suspension or expulsion on certain stipulated grounds. The phrasing is usually "continued and willful disobedience or open and persistent defiance of proper authority.[44] Sometimes the grounds are stated as "behavior which is inimical to the welfare, safety, or morals of other students." These criteria are being tested every working day of each week. At issue in a protest case was the punitive action taken against students who had participated in a lunchroom milk boycott.[45] A lower court in Michigan held that a school board had the authority to expel students from school who persisted in wearing a mustache or goatee. A principle supporting such broad power is that the teacher stands in loco parentis—at least at the pre-college levels—with authority no more subject to question than is that of a wise and solicitous parent.[46]

There are instances when expulsion is frowned upon by the courts. The grounds are not sufficient, in the case of a married female student, that her husband had abandoned her and that the child had been conceived out of wedlock.[47] Such harsh means as dismissal or expulsion may not be employed to discipline students for truancy when the issue was their assertion of constitutional rights.[48]

In some instances expulsion of students flies in the face of procedural "due process" if not substantive aspects of this significant constitutional protection of privacy. The student who feels aggrieved has a better chance today under the concept than yesterday because the courts have expanded the notion only recently. There are admonitions like the requirement of "scrupulous observance of individual rights"[49] and that rules of boards should not violate principles of fairness or due process.[50] Other recent cases stress the elements of a "proper hearing" regarding expulsion,[51] of what might be called "premature action" on the part of a parent to counsel at a hearing or conference concerning a student's suspension,[52] or the intervention of the federal courts when state law appears not to protect the rights of individuals.[53]

Petitioners in suspension and expulsion circumstances challenge at least initially, respondent board's action on procedural grounds. The usual lamentation is that the petitioner was not afforded a "proper hearing" before the board of education. One example is that the so-called "notice" had been sent home by way of the seven year- old who had made an airplane with it. More seriously though is the complication that too often statutes authorizing boards to expel students contain no procedural expectations. The courts therefore are forced to find that neither the student nor his parent was denied his rights—that in fact there had been some notice of the charge and that suitable opportunity to be heard had indeed been afforded at the regular meeting time and place prior to respondent's decision to expel the youth.

When either suspension or expulsion is contemplated by school authorities, it should be incumbent upon them—for clearly legal as well as sound ethical motives—to put into writing a clear statement of the issues involved plus the stipulations to be met for reinstatement. The routes of appeal ought to be indicated whereby the student and parent (or legal guardian) are informed of whom to see and where.[54]

Before moving into the next section on dilemmas facing governing boards because of their own shortsightedness and the heightened awareness of students about their civil rights, a consideration remaining within the topic of board rules relates to almost tacit approval whereby school employees are not discouraged from invading privacy and other civil rights by careless of gruff questioning of students. Investigations which fall short of out-right accusations by school personnel but often include searching of the student's body are blinked at by otherwise scrupulous personnel. Reasons advanced include so-called "implied parental consent" or that the school authorities owe a duty to all students within their custody to protect students from each other, or that "minors have not as yet reached the age of criminal responsibility."

In the realm of "investigatory interrogations" of students by school personnel and the police, it would appear that educators are not going beyond the bounds of their "in loco parentis role". Here the object is not to "get suspects" nor is the intent to make arrests. In other words, a board rule authorizing the search of the persons of students is supported providing the search is in good faith and for an educational purpose.[55] At least part of the requirement here is that the employe bear in mind the interests of the child rather than his own narrower yet more nearly visible need to maintain decorum. The office of the Kentucky Attorney General has provided this guide:[56]

> /A/ school teacher may search a pupil's pockets or purse and confiscate such articles as cigarette lighters, pocket knives, or key chains with cigarette lighters attached if the teacher acts with reasonable judgment and for good cause, without malice and for the welfare of the child, as well as the school. However, the pupil's parents should be advised, of this action and the confiscated articles turned over to said parents. If the pupil is guilty of subsequent offenses of this nature, the teacher might be empowered to retain the articles confiscated until the close of the school year.

The "accusatory-type" interrogation and search are quite a different matter as far as civil liberties are involved. In a recent issue of the Journal of Family Law an attorney explored the constitutional dimensions of crime investigation in schools.[57] One finding is that "a search is made if the teacher compels the student to produce or at least expose matter otherwise covered from the plain view of the teacher." Consequently, any teacher who orders a student to empty his pockets, remove his coat or shoes, or empty his mouth of its contents has made a "search" whether the student was physically handled or not in the process.[58]

The policy manual of school boards should spell out the restrictions to be placed upon employes in dealing with students. No school employe or officer has any more legal right to question students, without first apprizing them of their constitutional rights, than has a police officer when the questioning has the purpose for possible prosecution in a juvenile court.[59] There could be at least two consequences for a school employe of an unconstitutional search. He could be personally liable under both state and federal laws for a tortious violation of the privacy of a student. Any evidence produced by the unconstitutional search is not admissible as evidence at the trial. Advice from attorneys for school people is that they not search students without first securing a citizen's arrest. Leave it up to the school principal to request a search from the student that is clearly a voluntary one. The school office should call the local police who can execute a search warrant.

The problems surrounding search include places as well as persons. Is the locker of a student--who is in common school of college--an area protected from search by school authorities? No cases have reached the courts on this issue. The nearest parallel is that involving a federal employe.[60] Suspected of committing petty larceny, the employe was questioned by the police. Those interrogating asked and received permission from the employes superior to search the desk of the worker in which "incriminating evidence" was found. A federal court of appeals held that agents of government could not search the worker's desk to seek evidence of her crime even though the federal government owned the desk. The court did say that an agent of government could have gone into the desk for any property needed for its official use. In a case involving search of lockers but pertaining to schools, the United States Supreme Court affirmed the basic notion that no agent of a school board can compel a student to surrender his constitutional rights as a privilege to attend school.[61] Authorities could ask for the student's permission to inspect the locker by securing a signed statement at the start of school agreeing beforehand to any searches that would be thought to be necessary.

In this portion of the paper about board rules concerning suspension and expulsion, the situations present vividly the dilemma facing the policy-makers and their administrators. More sharply than any other controls used by governing boards, these tactics demonstrate that several courses of action can claim to be THE loyal and responsible and correct course to take. Perhaps the point need not be labored since ejection of a student from the public schools involves such basic concepts of freedom as "rights" and "burden of proof". "What is reasonable" in a particular fact situation sometimes confronts a jury that must struggle with the perplexing elements of "due process". In specifics, the educator who gets himself plunged into difficulties over possible violations of students' rights must comprehend the rules. He has gone too far already when he acts as both judge and executor of a rule. When justice is "instantaneous", what is the student "taught" about the import of civil liberties?[62] The chairmen of some of the affiliates of the ACLU have often remarked that students who are suspended for infractions of "the rules" are board "pushouts" rather than true dropouts from the establishment.

As in most instances where "services in the public sector" lies at the middle of the problem, the law describes for student and educator alike only the minimum both can get by with. It was not developed to help point the pathway to what are the "oughts" in human relationships.[63] It requires little imagination and only a bit more perception to realize that what the educator IS and what he DOES in contacts with students are more influential than what he happens to say. "Self-discipline" at least suggests a slow process whereby authority is transferred from without the student to within him—from law enforcement from the outside adult world to maturity and self-controls. In terms of most rules promulgated by governing boards and their agents, it would seem that one sure course is the creation of a permissive attitude—or playing it "cool" in teenage parlance—but coupled with firm treatment of all students. Such treatment should rest upon some broadly understood ground rules. Why would not such a route be a sure and speedy avenue to student responsibility and self-control? When rules developed within such a climate are conduct guides for all within the establishment, thoughtfulness and consistency and true kindness would bring near the zero point the need to battle for private rights in the adversary atmosphere of the courts.

COURT-IMPOSED TEST OF "REASONABLENESS"

Because state laws grant broad authority to local boards of education, both to operate and to manage schools within their jurisdiction, the courts must take a look at the rules and regulations—especially those which limit the action of students—to inquire as to their "reasonableness." A rule which does not conflict with the provisions of a state constitution or statures may still be arbitrary and thus not a reasonable one. A reasonable rule has some ". . .rational and substantial relationship to some legitimate purpose."[64]

Origin of the Criterion

Whether a board rule about student conduct is reasonable must be a question for the courts. Such a rule is unreasonable in no abstract sense. For example, courts will interfere where there is a finding of a violation of due process or of a capricious exercise of board discretion or of malice or bad faith.[65] Each fact situation must be looked at separately.

Materials containing court-established bases for reasonableness of board rules include books by Newton Edwards, Hamilton and Reutter, Lee Garber, Madaline Remmlein, and Reynolds Seitz; the NOLPE volumes; The Yearbooks of School Law; and articles in various state bar journals, in the American Law Reports series, and in American Jurisprudence and in Corpus Juris Secundum. Without exception the cases reported involving the wisdom of rules adopted by governing boards to control student behavior show that the student has the legal right to attend the local public school but subject to appropriate controls.

Specific Examples

A rule which barred a student from instruction solely because of the length or appearance of his hair was held "not to be so unreasonable" nor arbitrary that the court would upset a finding by the local board that the regulation was connected with successful operation of the schools.[66] A high school student had loitered on school premises after completing an examination, at which time an "undescribed incident" had taken place between him and another student. Under the state penal law he was convicted of disorderly conduct for "loitering on school grounds." Conviction on appeal was affirmed, the court holding that the section prohibiting loitering was indeed applicable to students regularly registered at the school on which premises the violation had occurred.[67] In another instance parents had alleged their child had been improperly disciplined by school authorities and unfairly penalized in her school work. The State Commissioner of Education sustained the discipline because it had been reasonably applied.[68] A court held that disciplining students for truancy could not be imposed as suitable punishment for one's asserting his constitutional rights.[69]

Courts have used the reasonable test of rules to apply to rules beyond school premises. A court sustained the right of a board to exclude a female student from school because her immoral conduct tended immediately and directly to destroy the discipline of the school.[70] Other cases have illustrated that rules for conduct control beyond school premises must not be subversive of the rights of students nor of their parents. Sometimes boards have over-extended school jurisdiction after school hours.[71]

Obviously one rule that pertains to student behavior away from school pertains to marriage regulations of school-age students. Married students and school boards have brought special problems to those operating the public schools. Student marriages have brought school boards and students to the courts where the issue has been one of violation of civil liberties. It has been more than a century since the first court test of a statute relating to the admission to a public school of a married student.[72] Since the Civil War-time case the courts of record have heard dozens of cases involving the rights of students who were married. Most have occurred since World War II.

The court decisions within the past decade have tended to support the rights of students to attend school even though married. Where permissible, school authorities are tending to apply special regulations to students who are married or treating them as if they were unmarried.[73] On the other hand, courts are still saying that boards may expel married students.

The question of the legal status of married high school students regarding participation in school-sponsored nonclass activities is less controversial. No denial of equal protection of the laws, have said some courts, when boards have declared ineligible for such participation the student who is married. Classifications by boards are valid and enforceable when these are reasonable. Barring married students from the after-school, more informal-type activity is justified since the married student can more easily influence other students.[74] Again, the student possesses no right to compel a board to exercise its discretion to the student's own personal advantage. Engaging in out-of-class but school-sponsored activities is, declared a court, a privilege conferred by the board upon those students who meet the board's criteria for such participation.[75] It is the position of the courts that they have a duty to uphold school board regulations. The presumption is in the board's favor, and burden of proof liew with the one complaining. A board may penalize a male student for marrying by not permitting him to play basketball in the name of the school. Such prohibition is no violation of his liberties and not against public policy. The student had no "vested right" taken from him by the board regulation.

Reasonable board rules pertain to other matters besides grooming and activities away from the school premises. One such concern of students is that of getting "equal opportunity" for an education. In terms of seeing to it that students are not classified on the basis of color, the school board has the burden to justify delay in the required full implementation of the constitutional rights of students. Planned delay is not a reasonable exercise of discretion.[76] Students have the right to equal opportunity in the public school system which may even involve their transfer from city to suburban

As the question of forced school integration as opposed to desegregation arose in the Savannah case the court decreed that a compulsory racially integrated school system was not required to meet the constitutional mandate that there be no discrimination on the basis of race in the operation of public schools.[37] When in a later case white plaintiffs claimed a violation of their rights, the court declared that:

> Racial integration in public schools does not, per se, discriminate against white pupils, and only if specific provisions of the integration plan do in fact discriminate against white pupils..., can it be said to result in the infringement of their constitutional rights.[38]

The question of enforced racial mixing in the public schools was more specifically dealt with in a New York case. In this instance, the court declared that in drawing attendance lines for schools, it was not only within the power of the Board of Education to consider the ethnic composition of a student body, but it was the board's responsibility to do so in order to prevent the creation of segregated schools.[39] In a later New York case, the state Supreme Court approved a school pairing plan requiring children in certain grades to attend a school outside their neighborhood in view of the additional benefits that would immediately result.[40]

The founding of private schools as a device to circumvent desegregation was struck down in two Virginia decisions. In one case the district court held that the state laws providing scholarships were administered unconstitutionally. White public schools were closed while Negro schools remained open, and the private schools admitted all white pupils who applied, but no Negroes.[41] In a similar case private schools for white students only, supported almost entirely by public funds in the form of tuition grants, with the same white teachers as formerly taught in public schools, were declared violative of constitutional rights.[42]

Following the enactment of P. L. 88-352, the 1964 Civil Rights Act, and the passage of a full decade after the Brown decision, the full force of the courts was directed toward achieving compliance. The Fifth Circuit Court of Appeals in the Singleton case required that, in redrawing plans for the desegregation of public schools, districts should be guided by standards developed by the United States Office of Education.[43] However, in the 1966 decision in the Singleton case, the court, while still voicing its acceptance of the standards established by the Office of Education, declared that it did not abdicate its judicial responsibility for determining whether a school desegregation plan violates federally guaranteed rights. It then set September 1967 as a target date for total school desegregation.[44]

The assignment of staff in the public schools on a non-racial basis became increasingly a part of the general desegregation problem. In Wright v. County School Board the court demanded that a freedom of choice plan for pupil assignment include provisions for the employment and assignment of staff on a non-racial basis.[45] Limited provisions for staff desegregation caused one court to invalidate the total desegregation plan adopted by the school board.[46]

By the end of 1966, the courts were demanding total and immediate compliance with the Supreme Court decision, and increasingly, they were requiring specific implementation of the Office of Education guidelines under the 1964 Civil Rights Act. The desegregation plans of one school district were found invalid because there was no true substance in the alleged desegregation. Less than two-tenths of one per cent of the Negro children in the system were attending white schools. The court ordered the plan modified so that all grades would be fully desegregated by the beginning of school in the fall of 1967.[47] The comprehensiveness of the court push toward compliance can be seen in the recent decision of the Fifth Circuti Court of Appeals in the Jefferson County case. The integration of school systems, students, faculties, and activities was interpreted as mandatory under the Brown decision. The court said, "The law imposes an absoluteduty to desegregate,that is disestablish segregation, and an absolute duty to integrate." The court went on to say:

> Now after twelve years of snail's pace progress toward school desegregation, courts are entering a new era. The question to be resolved in each case is: How far have formerly de jure segregated schools progressed in performing their affirmative constitutional duty to furnish equal educational opportunities to all public school children? The clock has ticked the last tick for tokenism and delay in the name of deliberate speed.

Further, the decision established the guidelines of the Department of Health, Education and Welfare as a standard for court-supervised school desegregation.[48]

As was obvious from this review of the Supreme Court decision in the Brown case and the actions of the lower courts that followed, the decision was a vital one and our society will be many years in achieving full adjustment to it. The cases cited show that there have been many twists and turns between the original pronouncement and its actual implementation, but the general direction has been constantly toward a full compliance with the Court's mandate, both in law and in spirit. At this point in time the law has been fully established; segregation in our public schools is illegal. The states have an affirmative duty to desegregate. Now we face the educational challenge to make desegregation work. Let us be about this task.

FOOTNOTES

1. Marbury v. Madison, 2 L.Ed. 60.

2. McCullough v. Maryland, 4 L.Ed. 316.

3. Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S. Ct. 686.

4. Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138.

16. *Dove v. Parkam*, 196 F. Supp. 944. (Ark. 1961); see also *Wheeler v. Durham City Board of Education*, 196 F. Supp. 71 (N.C. 1961). Reversed on appeal, 309 F.2d 630 (No relief granted). Dealing with desegregation, the case does, however, talk of minors' rights.

17. *Walter v. Davidson*, 214 Ga. 104, S.E. 2d 113 (1958). The court here said that it would be nonsense to require teachers and administrators (of a college faculty) to maintain discipline and moral conduct, and at the same time deny to them the right to confer with each other revealing facts, circumstances and suspicions of wrong doing by students.

18. *Dixon v. Allen*, 69 Cal. 527, 11 P. 179 (1886).

19. *Forsythe v. Durham*, 270 N.Y. 141, 200 N.E. 674 (1936).

20. If queries are made in furtherance of a criminal investigation, it is conceded that statements made by a party to an official who is investigating a crime are privileged when made in good faith and on probable cause.

21. It is not clear when the records of one accused can be withheld during an investigation. The area is "legally a gray area". There is absolute privilege for federal employes. The prosecutor of Wayne County, Michigan can subpoena confidential materials about one accused of a crime.

22. Legal recognition of privilege deals only with part of the problem of confidential communications. Though the law in Michigan, for example, authorizes school personnel not to testify in legal proceedings about confidences, it affords but limited protection in the nonlegal setting.
    One feature of the 'Community-School' idea as advocated by the Charles E. Mott Foundation (Flint, Michigan) is that of a local law enforcement officer being assigned to a public school. He thus becomes truly one of the members of the school staff, available for help when disputes arise.

23. Strahan, Richard Dobbs, *Legal Briefs for School Administrators* (Houston, Texas: Gulf School Research Development Association, No. 1, March, 1966). The three briefs in the issue deal with the legal status of pupil personnel records, those who should have access, and problems arising from improper making or management of such documents.

24. See Martha L. Ware, Editor, *Law of Guidance and Counseling*, (Cincinnati: W. H. Anderson Company, 1964, 178 pps.) for a section about what parts of a student's personal history could be used as evidence in court.

25. Good intentions do not furnish a valid excuse for violating another's right to privacy or give impunity to those who case unjust shadows on the private lives of others. See *The Count Joannes v. Bennett*, 81 Am. Dec. 738 (Mass. 1862). Motives underlying communications are generally not the issue in defamation cases. Here a defendant must show some facts or circumstances in his relation to the party or in inducements by which he was led to write the communication which he sent. The educator may be liable for official acts done in bad faith.

26. According to the American Psychological Association, reported in Norma E. Cutts (Ed.), School Psychologists at Mid-Century, (Washington, D. C.: American Psychological Association, Inc., 1955), 89-90. The right of privacy aside, the student has a basis for a suit when items are left in his folder of a libelous nature. These should be deleted and reliance made upon the first-hand knowledge of others.

27. Holden v. Board of Education of Elizabeth, 46 N.J. 281, 216 A. 2d 387 (1966). The Commissioner held the children to have such scruples which qualified them for exemption under the law. He stated that compulsory participation in the prescribed salute would run afoul of the First Amendment regardless of the religious beliefs of the students. The state Supreme Court adopted the full text of the Commissioner as its own.

28. Reed v. Van Hoven. 237 F. Supp. 48 (D.C. Mich. 1965). Readings were permitted in public schools at anytime, provided they were voluntary.

29. Chamberlain v. Dade County Board of Public Instruction, 143 S 2d 21 (Fla. 1962) held valid a statute requiring readings, the Lord's Prayer, and hymns where the students who wished could be excused. In Schempp v. School District of Abington Township, Pa., 201 F. Supp. 815 (1962) the court held that the First Amendment neutrality requirement was violated by requiring Bible readings even if the students were excused. In Stein v. Oshinsky, 224 F. Supp. 757 (1963) voluntary prayer was held not to be any establishment of religion by government. The First and Fourteenth Amendments were cited in Johns v. Allen, 231 F. Supp. 852 (D.C. Del. 1964), in Adams v. Engelking, 232 F. Supp. 666 (D.C.Idaho 1964), and in Waite v. School Committee of Newton, 348 Mass. 767. 202 N.E. 2d 297 (1964).

30. Mitchell v. McCall, 273, Ala, 604, 142 S. 2d 629 (1962). In Connell v. Gray, 33 DEL. 591, 127 P 417 (1912) a gym uniform rule was upheld as necessary and convenient.

31. Some places where long hair has been an issue are Riverside, California; Albuquerque , New Mexico; and Seattle, Washington. In New York City the superintendent of schools backed up the right of students to wear their hair long if they so happened to choose.

The United States Supreme Court declined to hear the Virginia College "long hair case", although the appeal seemed to the ACLU to be a clear indication of the seriousness with which that group at least views the First Amendment principles at stake in the grooming cases.

32. Ferrell v. Dallas Independent School District. 261 F. Supp. 545 (1966).

33. Leonard v. School Committee of Attleboro, 349 Mass. 704, 212 N.E. 2d 468 (1965), The plaintiff was a seventeen year-old student who claimed that the appearance of his hair was essential to his image as a performer and his ability to follow his chosen profession. Since he was twelve, the lad had played professionally performing at the Newport Jazz Festival and at the New York World's Fair. Despite his assertion at the trial that his hair and image and success were one, the court ruled for regulation. See also Lee O. Garber and E. Edmund Reutter, Jr., The Yearbook of School Law 1967, (Danville, Ill.: The Interstate Printers & Publishers, Inc., 1967, pps. 249-50.

34. Pelletreau v. Board of Education of Borough of New Milford New Jersey, Sept. 6, 1967. From the record the Board could see no significant threat to the learning process and no probable reactions from other students so disruptive so as to extend beyond the control exercised by the devices within the reach of any classroom teacher. The Board wondered whether the day might not return when rule promulgators would again adorn themselves with real or false artificial locks.

35. Colorado Revised Statutes Annotated, Sec. 123-20-7 (1) (d) (1963). See also Elise M. Martin, "The Right to Dress and Go to School", University of Colorado Law Review, 492 (1965).

36. A 1921 case, Jones v. Day, 127 Miss. 136, 89S.906 (1921) dealt with the court's upholding of the wearing of uniforms for the welfare of the school and the maintenance of discipline. In Pugsley v. Sellmeyer, 250 S W 538, 158 Ark. 247 (1923), the court upheld a board ruling against the use of plain talcum powder on a girl's face. A rule prohibiting the wearing in school of shoes with metal tape was upheld in Stromberg v. French, 60 N.D. 750, 236 N.W. 477 (1931).

37. From the Pelletreau decision, Op. Cit.

38. Tinker v. Des Moines Independent Community School District 258 F. Supp. 971 (1966).

39. 79 Corpus Juris Secundum, p. 449 (Sec. 503).

40. Holroyd v. Eibling, 116 OA 440, 188 N E 2d 797 (1962).

41. Application of Olson, 242 NYS 2d 1002 (1963).

42. In Alvin Independent School District v. Cooper, 404 S W 2d 76 (1966), the court said the statute granting broad powers to governing boards of the schools did not permit permanent exclusion of a person—even though a mother—within legal school age limits. The concept of "scholastic age" may be vague enough to imply permissive exclusion during pregnancy. See also, Kissick v. Garland Independent School District, 330 S W 2d 708, (1959).

    Courts have excluded girls from school for "immoral conduct off school grounds." They have sustained the punishment by school authorities of students who annoy others on their way home from school even though the students have reached home. Boards have been sustained in enforcing rules prohibiting disorderly conduct by students on school holidays.

    Judicial concurrence with rigid rules concerning student conduct is not to be construed as court approval of the propriety of the regulations. They have repeated often that courts do not decide upon the wisdom or the level of foolishness of board regulations.

43. 79 Corpus Juris Secundum 448-451 (s 503). See State v. Board of Education of Eau Claire, 71 N W 123, 96 Wisc. 95 (1897).

44. Colorado Revised Statutes Annotated, Sec. 123-20-7 (1)(b) (1963).

45. Stanley v. Gary, 237 So. C. 237, 116 S E 2d 843 (1961).

46. Indiana State Personnel Board v. Jackson, 244 Ind 321 192 N E 2d 740 (1964). The goatee case came from Grand Rapids, Michigan and involved Negro boys. The in loco parentis concept seems to be a severe infringement on the rights of students—even when not carried to any extremes.

47. Nutt v. Goodland Board of Education, 278 P 1065, 128 Kan. 507 (1929).

48. Woods v. Wright, 334 F 2d 369 (1964).

49. Covington v. Edwards, 264 F 2d 780 (1959), Dixon v. Alabama Board of Education, 294 F 2d 150, 157. and Wheeler v. Durham County Board of Education, 196 F. Supp. 71 (1961).

50. Munter v. Gross, 42 N.Y. Misc. 2d 690, 248 NYS 2d 717 (1964).

51. Hollenbach v. Elizabethtown School District, 18 Pa D.C. 2d 196, (1958).

52. Cosme v. Board of Education of City of New York, 50 N.Y. Misc. 2d 344, 270 NYS 2d 231 (1966).

53. Parham v. Dove, 271 F 2d 132 (1960).

54. Where a student believes he has been illegally expelled (or even suspended), he may compel readmission by mandamus. In some cases his readmission may be compelled by a mandatory injunction. See 79 Corpus Juris Secundum 451-452 (S504); Cross v. Walton Graded Common School, 110 S W 346, 129 Ky. 35 (1908); Covington Board of Education v. Booth, 62 S W 872, 110 Ky. 807 (1901); and 53 L.R.A. 787.

55. Christofides v. Hellemic East Orthodox Christian Church, 33 N.Y. Misc. 2d 471, 227 NYS 2d 946 (1962). The court here held that a knife with a three-inch blade to be per se a dangerous instrumentality in the hands of a child. See also Lilienthal v. San Leandro Unified School District, 193 Cal. App. 2d 453, 293 P 2d 889 (1956).

56. As have the Attorneys General of several other states.

57. Lawrence W. Knowles, "Crime Investigation in the School: Its Constitutional Dimensions," Journal of Family Law, 4, p. 151 (1964).

58. In a Tennessee case, Marlar v. Bill, 178 S W 2d 634, 181 Tenn. 100 (1944), a lad was punished for lying and breaking a board regulation prohibiting students from entering classrooms during recess. Apparently he falsely denied so doing when accused. A ten cent piece was reported missing from that classroom, whereupon the teacher searched the boy. His parents sued the teacher, seeking to recover money damages for the alleged illegal search. The Tennessee Supreme Court upheld the teacher on the grounds that the motive in searching the boy had been "to clear him of any suspicion. Thus the teacher acted for the child's own welfare.

    In Phillips v. Johns, 12 Tenn. App. 354 (1930) the court said that a teacher who had searched a student--because the teacher could not find twenty-one dollars— could have been held liable in money damages to the girl. The search had been conducted for the teacher's benefit, not for the welfare of the child.

59. The 1964 United State Supreme Court decision in Escabedo v. Illinois, 378 U S 478 (1964) bears on this point. There must be a positive effort to insulate the suspected student against self-incrimination. The school official who cooperates with police officials by turning the student over to them may become a party to an illegal venture.

60. United States v. Blok, 188 F 2d 1019 (1951).

61. *Board of Education v. Barnette*, 319 U S 624 (1943).

62. Reutter, cited in *Carter*, *Op. Cit.*, develops well the "competing consideration" approach to examining legal issues. Reutter comments that on most matters the law is not precise, an idea quite contrary to popular opinion. Statutes which appear to be precise are not when used in specific cases. For example, a student could be expelled for flouting a board rule. However, what constitutes such scoffing, or what is reasonable under the rule to control behavior are questions for hearings and other mechanisms.

63. In the speaker's volume, *Legal and Ethical Responsibilities of School Personnel* (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1959) the focus is on those issues facing teachers, administrators, board members and parents where both the law and ethics are inseparable components.

64. *New Jersey Good Humor, Inc. v. Bradley Beach*, 124 N.J.L. 162, 11 A. 2d 113 (1940).

65. In Charles K. Woltz, "Compulsory Attendance at School," *Law and Contemporary Problems* (Vol. 20, 1955), 3-22, this comment is made: "No court in this country has ever held it beyond the competence of the state to require that children be exposed to a certain amount of instruction, nor has any court denied the power of the state to make reasonable provisions as to the type, means, and supervision of such instruction. Thus the basic principles. . .are as firmly supported by legal precedent as by public opinion."

66. *Leonard v. School Committee of Attleboro*, 34a Mass 704 212 N E 2d 468 (1965). See also *Detch v. Board of Education of Greenbrier County*, 145 W. Va. 722, 117 S E 2d 138 (1961) and *Burnside v. Byars*, 363 F 2d 744 (1966).

67. *People of the State of New York v. Tubiolo*, 237 NYS 2d 481, 38 NY Misc. 2d 324 (1963).

68. From *New Jersey School Law Decisions* (1965), 122. While waiting in the school office, both prior to and after being forced to clean school walls, some of the girls of a group of five requested permission to get belongings from their locker and to get drinks of water. It was alleged that all the requests had been denied by school authorities.

Petitioners in the above case charged that their daughter had been subjected to biased questioning, had been falsely accused of damaging school property, had been kept from using the lavatory while detained in the high school office, and had been forced to perform servile acts. The Commissioner ruled that school punishment had been reasonable due to the student's deliberate act of vandalism.

69. *Woods v. Wright*, 334 F 2d 364 (1964). In *Burdick v. Babcock*, 31 Iowa 562 (1871) the court said: "If the effects of acts done out of school hours reach within the school-room during school hours and are detrimental to good order. . . it is evident that such acts may be forbidden. Truancy is a fault committed away from school. Can it be pretended that it cannot be reached for correction by the school board and teacher?"

70. See Newton Edwards, *The Courts and the Public Schools* (The University of Chicago Press, 1958), 589-590.

71. There must be no rule wresting from a parent his right to control his own child. Boards have gone far in adopting rules arrived at controlling any outside behavior that might subvert judicious conduct of school affairs.

72. Draper v. Cambridge, 20 Ind. 268 (1863).

73. In Alvin Independent School District v. Cooper, 404 S W 2d 76 (1966) the court said a statute granting broad powers does not allow rules which permanently exclude from school one of scholastic age. In general a board may not forbid attendance by married students but can require withdrawal of students who are pregnant.

74. Board of Directors of Independent School District of Waterloo v. Green, 147 N W 2d 854 Iowa (1967). In Ohio a board adopted a rule forbidding married students from nonclass types of activity. An action was brought to have the court declare the rule invalid. This was instigated by a senior high student at the Taft High School in Hamilton. He had been excluded from the basketball team. He had been co-captain and had maintained an above average rating in his classes. The court said that the board was well within its discretion when it adopted rules with respect to youthful marriages. State v. Stevenson, 27 Ohio op 2d 189 N E 2d 181 (1963).

In Michigan the court split on appeal from a decision of the Circuit Court which had found that a school district does not violate the law guaranteeing to all students an equal opportunity to use public educational facilities when it excludes married students from participating in "extra-curricular" activities. Cochrane v. Board of Education of Messiok Consolidated School District, 360 Mich. 390 103 N W 2d 569 (1960).

Following the reasoning of the Tennessee Supreme Court, the Dallas Court of Civic Appeals sustained a resolution of a board restricting married students to classroom work, barring them from athletics, positions of honor, and from otheropportunities. Kissick v. Garland Independent School District, 330 S W 2d 708 (1959).

75. Starkey v. Board of Education of Davis County School District, 381 14 U 2d 227 P 2d 718 (Utah, 1963).

76. Snell v. Savannah-Chatham County Board of Education, 333 F 2d 55 (1964).

77. Etter v. Littwitz, 268 NYS 2d 885, 49 NY Misc 2d 935 (1966).

78. New Jersey School Law Decisions (1965), 115.

79. Miller v. School District No. 2, Clarendon County, 256 F Supp 370 (1966). Court here required the school board to provide courses in so-called "remedial education" under a proposed long-term plan.

80. Stell v. Savannah-Chatham County Board of Education, 255 F Supp 83, 88 (1966). Some contend that this amounts to just another type of segregation. In other words, why is not the self-concept argument in the Brown case applicable here too?

81. Pettit v. Board of Education of Harford County, 184 F Supp 452 (1961). In Jones v. School Board of City of Alexandria, 179 F Supp 280 (1960), the I.Q. score as a criterion for admission had the backing of reputable educators. Some preferred actual achievement to the I.Q. as the admission screen.

82. In Satan Fraternity v. Board of Public Instruction for Dade County, 156 Fla 222, 22 S 2d 892 (1945), the court said that none of the liberties of citizens is an absolute. Freedom is not something turned footloose to run as it will like a thoroughbred in a meadow. In Coggins v. Board of Education of Durham, 223 N C 763, 28 S E 2d 527 (1944), this attitude was stated thus: ". . . the reasonableness of . . . a rule is a judicial question and the courts have the right of review. In doing so, however, it will be kept in mind that the local board is the final authority so long as it acts in good faith and refrains from adopting regulations which are. . . unreasonable."

LEGAL RIGHTS OF MINORS IN SOCIETY

By

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When I was asked by President Reutter to talk this morning on the subject of the "legal rights of minors in society," I was advised that my presentation should be aimed at sketching the "big picture" to serve as a backdrop for discussion of the school law problems raised in Professor Gauerke's excellent and most comprehensive address which he just completed entitled "Legal Rights of Students in the School Setting."

The status of the legal rights of minors generally in our society, like the correlative rights of other citizens in the United States, is mirrored by the respect such rights are accorded in the Court. Since July 1, 1899, when the first state-wide juvenile court statute was enacted in Illinois[1], juveniles generally have been treated differently from adults in the courtroom. That is, the legal rights of juveniles have been viewed from a different kind of judicial prism. This different treatment was succinctly stated by Chief Judge Prettyman of the U. S. Court of Appeals, District of Columbia Circuit, when he declared in 1959[2] that:

> ...from the earliest times children of certain ages have been deemed by our law to be incapable of crime. And in recent times children of certain ages have been removed from the normal treatments provided for crimes and criminals. This has been in part because of a doubt as to the capacity of children to entertain the vicious will which is an essential element of crime in our jurisprudence, but in much greater part because of a belief that the interests of society are best served by a solicitous care and training of those children shown by circumstances to be in need of such care and training. These concepts in respect to children have evolved into elaborate systems of procedure. In the event a child commits an offense against the law, the state assumes a position as _parens patriae_ and cares for the child. Such a one is not accused of a crime, not tried for a crime, not convicted of a crime, not deemed to be a criminal, not punished as a criminal, and no public record is made of his alleged offense. In effect, he is exempt from the criminal law.

Not everybody accepted the validity of Judge Prettyman's glowing description of the way in which the juvenile court system worked. In California, the Appellate Court said that:

> While the juvenile court law provides that adjudication of a minor to be a ward of the Court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction, presenting a challenge to credulity and doing violence to reason.[3]

On the national level, the Kefauver Committee[4] said:

> As to the constitutionality of juvenile court proceedings - this is one of the major areas that the members of the delinquency subcommittee wished to look into. During its investigations, the omniscient attitude of some juvenile court judges coupled with arbitrary, obviously uncalled-for decisions, made some of the subcommittee members with socio-legal backgrounds wince with pain. The rights to a definite charge, counsel, a fair hearing, reasonably relevant and convincing evidence and appeal, which are ensured on even the most trivial issues to adults, were not being afforded children....

Apologists for the juvenile court system believed that the juvenile courts, by their paternalistic procedures, were actually giving children the benefit of super-constitutional rights through the dispensing of a warm, human kind of justice tempered by benevolence and profound desire to rehabilitate. Where the juvenile court system failed, these advocates[5] maintained that failure was due to three principal causes unrelated to the juvenile court approach:

1. The juvenile court is a "stepchild in the jurisprudential milieu ..." In effect, it is a sort of "junior criminal court." As such, it is not taken as seriously as it should be by the community it serves and therefore not supported to the extent it requires to be an effective arm of justice.

2. Many of the so-called "juvenile courts" are not true juvenile courts because of the paltry budgets on which they must operate. Inadequate financing precludes the level of staff support in the persons of psychiatrists, counselors, and probation officers which the juvenile court requires to be truly effective and fulfill its real purpose.

3. The resistance on the part of some juvenile court judges to the nonadversary nature of the juvenile court proceedings.

While this argument was raging, the fingerprints of a sixteen-year-old boy named Kent were found in the Washington, D.C., apartment of a women who had been robbed and raped. In this case[6], the Washington, D.C., Juvenile Court waived jurisdiction, as its statute provided[7], and bound the boy over for trial in the D. C. District Court. The boy was found guilty. The United States Supreme Court remanded the case back to the District Court on the narrow procedural grounds that the Juvenile Court improperly waived its jurisdiction under the D. C. Juvenile Court Act.

Kent had attacked the waiver of jurisdiction by contending that it was invalid because no hearing was held, no findings were made by the Juvenile Court, the Juvenile Court had stated no reasons for waiver, and Kent's attorney had been denied access to the "social service" file which presumably was considered by the Juvenile Court in determining to waive jurisdiction. The Supreme Court noted that the D. C. Juvenile Court Act:

> ...does not permit the Juvenile Court to determine in isolation and without the participation of any representation of the child the "critically important" question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act.

The Supreme Court was careful to point out that it did not consider whether, on the merits, Kent should have been transferred over to the District Court from the Juvenile Court for trial as an adult, but it expressly declared that

> There is no place in our system of law for reaching a result of such tremendous consequences without ceremony -- without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure.

The Kent case signaled the change which was to be made more precise in In re Gault[8] just one year later. The Kent case found no fault with the concept of the Juvenile Court Act. It recognized that the

> ... theory of the District's Juvenile Court Act ...is rooted in social welfare philosophy rather that in the corpus juris. Its proceedings are designated as civil rather than criminal (and) ...is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt, and punishment. The state is parens patriae rather than prosecuting attorney and judge.

But, the Supreme Court concluded, almost as a precursor of the Gault case, that:

> ... the admonition to function in a "parental" relationship is not an invitation to procedural arbitrariness.

The Kent case was a firm but gentle approach to the Juvenile Court concept. On May 15, 1967, the Supreme Court took off its kid gloves in the Gault case. The matter came before the Court on appeal from the Supreme Court of Arizona which had affirmed a lower court's refusal to issue a writ of habeas corpus releasing Gerald Gault, 15 years of age, from the Arizona State Industrial School where he had been committed as a juvenile delinquent by the Gila County Juvenile Court.

Gerald Gault had been taken into custody along with another boy by the Gila County sheriff on the verbal complaint of a neighbor lady who alleged that the two boys had telephoned her and had made lewd and indecent remarks over the phone. At the time Gerald was taken into custody, he was on six months' probation for having been in the company of another boy who had stolen a wallet from a lady's purse.

Gerald was taken into custody at his home during the daytime and no notice of his pick-up was left at his home for the information of his mother and father who were at work. That evening, Gerald's mother went to the detention home and was verbally advised that a juvenile court hearing would be held the next afternoon.

At the juvenile court hearing, the probation officer filed a petition with the court asking that the court determine "the care and custody" of Gerald. A copy of the petition was not provided the Gaults. The hearing was held in the Juvenile Court Chambers. The neighbor lady who had accused Gerald of having made offensive remarks to her over the telephone was not present. No one was sworn at the hearing. No transcript of recording was made and no memorandum or record of the substance of the proceedings was prepared. At the end of the hearing, the juvenile court judge said that he would "think about it." A few days later, Gerald was released from the detention home.

On the day of his release from the detention home, Gerald"s mother received a brief note on plain paper from the probation officer stating that the juvenile court judge had set further hearings on Gerald"s case at a time certain three days from then. At the second hearing, the neighbor lady complainant was not present, even though Gerald"s mother had asked that the complainant attend the hearing. Again, apparently, no one was sworn and no transcript of the second hearing was made. A probation officer's "referral report" charging Gerald with having made "lewd phone calls" had been filed with the court at the second hearing but it was not disclosed to the Gaults.

At the conclusion of the second hearing, Gerald was committed as a juvenile delinquent to the Arizona State Industrial School "for the period of his minority (that is, until 21), unless sooner discharged by due process of law."

In reviewing the decision of the Arizona Supreme Court refusing to release Gerald from the Arizona State Industrial School, the U. S. Supreme Court specifically limited the scope of its decision to the problems presented in the case. The court was careful to remark:

> We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile delinquents. For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process. We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution.

The court recapitulated the history and theory underlying the development of the informal paternalism and broad discretionary powers of the juvenile court and concluded that:

> The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective prodecures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness. ...Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the power which the State may exercise.

The court observed that procedural regularity and exercise of care inherent in due process would not impair the effectiveness of the juvenile court but that, instead:

> ...the appearance as well as the actuality of fairness, impartiality and orderliness -- in short, the essentials of due process may be a more impressive and more therapeutic attitude so far as the juvenile is concerned.

The court reiterated a view in connection with a juvenile court adjudication of "delinquency" which it had expressed in an earlier juvenile court case (Kent v. U.S., 383 U.S. 541/1966/) when it declared that:

> We do not mean ... to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.

The court then turned to the specific charges involved in the case as follows:

A.

NOTICE OF CHARGES

The court held that due process requires notice of the charges which would be deemed constitutionally adequate in a civil or criminal proceeding. The court said that:

> Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must "set forth the alleged misconduct with particularity."

B.

RIGHT TO COUNSEL

The court declared:

> We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parent must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

C.

CONFRONTATION, SELF-INCRIMINATION, CROSS-EXAMINATION

The court said that:

> We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique - but not in principle - depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, juvenile courts and appellate tribunals in administering the privilege. If counsel is not present for some permissible reason when an admission is obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it has not been coerced or suggested, but also that it is not the product of ignorance of rights or of adolescent fantasy, fright or despair.

The court also stated, in relation to confrontation and cross-examination of a juvenile's accuser, that:

> Absent a valid confession adequate to support the determination of the Juvenile Court, confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of "delinquency" and an order committing Gerald to a state institution for a maximum of six years.

D.

APPELLATE REVIEW AND TRANSCRIPT OF PROCEEDINGS

The court refused to rule on the issue of whether a juvenile court in making a determination of "delinquency" must provide a transcript or recording of the hearings, but it did observe that

> ... the consequences of failure to provide an appeal, to record the proceedings, or to make findings or state the grounds for the juvenile court's conclusion may be to throw a burden upon the machinery for habeas corpus, to saddle the reviewing process with the burden of attempting to reconstruct a record, and to impose upon the juvenile judge the unseemly duty of testifying under cross-examination as to the events that transpired in the hearings before him.

The court reversed the judgment of the Supreme Court of Arizona and remanded the cause for further proceedings not inconsistent with this opinion.

Mr. Justice White, in a concurring opinion, said that he was opposed to reaching any conclusions on the issues of self-incrimination, confrontation and cross-examination.

Mr. Justice Black, in a concurring opinion, stated that he voted to void the Arizona law:

> ... Solely on the ground that it violates the Fifth and Sixth Amendments made obligatory on the states by the Fourteenth Amendment. ... The only relevance to me of the Due Process Clause is that it would, of course, violate due process or the "law of the land" to enforce a law that collides with the Bill of Rights.

Mr. Justice Harlan concurred in part and dissented in part. In his separate opinion he declared that only three procedural requirements should be deemed required of state juvenile courts by the Due Process Clause of the Fourteenth Amendment. These he identified as timely and full notice, right to counsel, and the maintenance of a written record, or its equivalent, adequate to permit effective review on appeal or in collateral proceedings. He stated that he would have preferred that the court defer its holding on the applicability to juvenile court proceedings of the privilege of self-incrimination, confrontation and cross-examination.

Mr. Justice Stewart dissented. In his dissenting opinion, he said:

> I believe the court's decision is wholly unsound as a matter of constitutional law, and sadly unwise as a matter of judicial policy.

He observed that the object of juvenile court proceedings is the correction of a condition, not conviction and punishment for a criminal act. He concluded that while a state must in all its dealings accord every person due process of law, the treatment of Gerald Gault complied with the Fourteenth Amendment because Gerald's parents:

> ... knew of their right to counsel, to subpoena and cross-examine witnesses, of the right to confront the witnesses against Gerald and the possible consequences of a finding of delinquency ...

and Mrs. Gault knew:

> ... the exact nature of the charge against Gerald from the day he was taken to the detention home.

The question which naturally arises upon a review of the line of cases ending with *Gault* is:

> What is the status of the legal rights of minors in our society today?

I am persuaded that the whole point of the *Gault* case is NOT to insulate children from the power of the state, but rather to protect them from the improper application of that power. There is not one word in the *Gault* case which stands for the proposition that the basic authority of the state over children, regardless of whether that authority is exercised through the schools, the juvenile courts, or the police or probation departments, has in any way been lessened. As has been said[10]:

> There spring to mind a dozen instances in which an infant, just because he is a child, is deprived of common adult freedoms, and in which he does not drive a car until he is 16; he may not marry without parental consent; he may not stay out after curfew; he may not vote; he may not incorporate a company; he may not convey by deed; he may not sit as a juror; he may not enlist without consent; he may not enter a saloon; he may not make a binding contract; he may not peaceably assemble in a school fraternity; he is not free until 16 to remain out of school. Let's face it: he simply does not have the constitutional rights of an adult.

Gault has changed none of this.

Viewed in this light, the criticism that children have been given increasingly greater protection of their civil rights *at the expense of the scope of authority of those who, on behalf of the state, deal with children in a supervisory or regulatory capacity*, is wholly invalid.

It is on this basis that I have counseled teachers and school administrators that the scope of their authority over pupils has not decreased, but the manner in which they may validly exercise that authority apparently is changing in tandem with the way that society's attitude toward the individual generally is changing. It is our task to develop sound new procedures and practices relating to the state's scope of authority over children which, while being consistent with the *Gault* case, will not be flawed by timidity, uncertainty, or an exaggerated fear of being wrong.

The implications of the *Gault* case on schools is clear. While the court specifically restricted its holding to the precise fact situation before it involving a charge against a juvenile which, if proved, could result in the incarceration of the juvenile, it would be myopic to conclude that Gault is of no concern to the school man. Gault has not junked the principle of *in loco parentis*. Rather, its effect will be to make that principle more objective. In effect, Gault could be viewed as requiring that the school man, as well as the juvenile court, be a wiser "parent." In light of Gault, it is difficult to believe that the courts, in considering, for example, expulsions, suspensions, or exclusions which have the effect of depriving a child of his legal right to public education, will say: "We consider the teacher to be right regardless of the circumstances -- and we don't want to hear about the circumstances." The courts will carefully review the procedures by which a child was deprived of his legal right to attend school. This is entirely consistent with the decision of the U. S. Supreme Court in the Gault case. But this does not mean that the courts will review the expulsion, suspension, or exclusion on the merits, except, of course, in those cases where there appear to be no valid grounds whatsoever for such action. This part of the law remains undisturbed by the Gault case.

In conclusion, the law tells us that the state still has the same basic authority over juveniles that it has had for many years -- but, that we had better develop procedures by which the objectivity of the rule of law (as frail as that sometimes is) will replace as much as possible the subjectivity of persons, which history has shown to be characterized so often and so sadly by arbitrariness, unfairness, and unreasonableness.

FOOTNOTES

1. *Justice for the Child*, p. 1., Margaret K. Rosenheim, (1962), The Free Press of Glencoe, N.Y.

2. *Pee v. U.S.*, 274 F2d 556 (558-59) (D.C. Cir. 1959).

3. *In re Contreras*, 109 Cal. App. 787, 241 P2d 631 (1952).

4. Report No. 130, Subcommittee on Juvenile Delinquency of the Senate Committee on the Judiciary.
   But see *The Child, The Family and The Young Offender*, Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, August 1966, London (Her Majesty's Stationery Office) for an opposite view for children under 16 years of age.

5. Paul W. Alexander, "Constitutional Rights in Juvenile Court," 46 ABAJ 1206 (Nov. 1960).
   For an excellent description of "pro" and "con" arguments concerning the Juvenile Court concept, see *Journal of the State Bar of California*, Vol. 40, No. 3, pp. 349 and 357, May-June, 1965. See also Curtis C. Shears, "Legal Problems Peculiar to Children's Court," 48 ABAJ 719 (Aug. 1962).

6. *Kent v. U.S.*, 383 U. S. 541 (1966).

7. Richard Mills, "Juvenile Delinquency -- Also a Federal Problem," 49 ABAJ 44 (Jan. 1963).

8. *In the Matter of the Application of Paul L. Gault and Marjorie Gault; Father and Mother of Gerald Francis Gault, a Minor*, 387 U.S. 1 (1967).

9. Norman Lefstein, "In re Gault, Juvenile Courts and Lawyers," 53 ABAJ 811 (Sept. 1967).

10. Paul W. Alexander, "The Fable of the Fantastic Delinquent," *Federal Probation*, March, 1960.

LEGAL PROBLEMS RELATED TO EXTRACURRICULAR ACTIVITIES

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"The term 'extracurricular activities' is both inaccurate and undesirable, but it is often used for no better reason than that people generally understand its meaning."[1] This criticism is of merit in relation to the educational values of out-of-class activities, but for the purpose of this presentation it seems unnecessary to conceal the true definition of these activities by calling them cocurricular activities or allied activities. Until school administrators and boards of education consider inter-scholastic athletics teams, school bands, student clubs, and other out-of-class organizations as educationally significant enough to support them entirely with public funds, they should be regarded as extracurricular; no matter how great their contribution to the total educational experiences of the students, they are outside of the curriculum administratively.

The four problem areas of extracurricular activities which will be discussed in this presentation are:

1. Finance
2. Rules and regulations involving pupils
3. Teacher assignments
4. Athletic associations

FINANCE

Most school districts support extracurricular activities, at least in part, by expending tax-derived funds, and their authority to do so has been challenged by taxpayers who allege that it is illegal to use public revenues to finance extracurricular activities because they are not part of the regular school program.

In a significant case which occurred in 1927, the Supreme Court of Arizona declared that competitive sports were properly included in the school curriculum and that the school district had the authority to issue bonds for the construction of a stadium.[2] Failing to be persuaded by the Supreme Court of Arizona, a Kentucky court ruled that a school district did not have the authority to use money in a special school buildings fund to repair a stadium.[3] The court, however, did not say that the board of education could not build and maintain a stadium; it only ruled that a stadium was not a school building and that money from a special school buildings fund could not be used for repairing it. Most courts, rendering decisions in agreement with the Supreme Court of Arizona, have upheld the authority of school districts to expend public funds for the construction and maintenance of auditoriums, gymnasiums, and stadiums.[4] The courts have also held that boards of education may invoke their power of eminent domain to acquire land on which to construct athletic facilities.[5]

Occasionally school districts and municipalities cooperate in financing the construction of auditoriums, gymnasiums, stadiums, and swimming pools. The courts have generally upheld such cooperative arrangements;[6] however, the Court of Appeals of Kentucky declared that a school district could not purchase a recreation center in another county under a statute permitting a school district to purchase jointly with a city or county a recreation center for use by its pupils.[7]

As a rule, school boards furnish supplies to be used by students participating in extracurricular activities. In two decisions rendered by the Supreme Judicial Court of Massachusetts, the authority of a school district to provide apparel for basketball and football teams was stricken down,[8] but two other courts declared that similar expenditures were legitimate and within the power of the school board to make.[9]

It is not uncommon for school districts to expend public funds in order to provide transportation for extracurricular groups, yet few cases pertaining to the subject have reached the appellate courts. Of the cases to come before the courts, the number is too few and the opinions too varied to arrive at a definite legal principle regarding this phase of extracurricular activities.

The Supreme Court of Iowa ruled that a school district could not provide transportation for extracurricular groups because the expenditure was unwarranted under the school code.[10] In the state of Utah the supreme court declared that a board of education could provide transportation for students who were required to attend extracurricular events but not to spectators.[11] And boards of education in Kansas, according to a decision of the supreme court of that state, were not permitted to transport students outside of the school district unless a contract to do so existed.[12] In a more recent case, the Supreme Court of North Carolina ruled that boards of education had the inherent right to contract for the necessary transportation for athletic teams and school bands.[13] Because of the absence of court cases, some attorneys general have been requested to issue official opinions in regard to the legality of providing transportation of pupils to extracurricular events. The Attorney General of California declared that school districts could use school buses to transport school bands to reviews and contests, but that they could not assume the expense of operating the buses.[14] The Attorney General of Indiana more recently stated in an official opinion that a board of education had no authority to use its buses to transport 4-H Club members to activities unless such events were school functions.[15]

Although some taxpayers have attempted to prohibit school districts from using their buildings for certain extracurricular events, the courts have held that they cannot enjoin a school board from using its buildings for athletic contests, dances, and other social activities.[16]

School districts sometimes encounter the problem of becoming involved in lawsuits as a result of profit-making ventures associated with extracurricular activities, although in most cases the courts decide in their favor. But one court ruled that unless all funds received from extracurricular activities were used for educational purposes, the school district would be required to pay state sales tax on the money received.[17]

The right of boards of education to charge a radio station fees for broadcasting football games has been upheld by the courts.[18] Likewise, the courts have ruled that a school district may rent its athletic facilities to private athletic groups [19] so long as the contract can be fulfilled without interfering with school activities.[20]

Since proceeds raised in the conduct of extracurricular activities are not tax revenues, the question has arisen as to whether they are public funds which come under the custody of the board of education. Several courts have ruled that proceeds of extracurricular activities are public funds and must be accounted for in the same manner as other school district funds.[21] However, a Kentucky court recognized the authority of a board of education to control activity funds, yet regarded its duty to do so as quasi-private which waived the school district's governmental immunity to liability in regard to debts incurred by those in charge of the activities funds.[22] Although it is generally accepted that extracurricular funds belong to the school district and should be handled accordingly, the Supreme Court of South Carolina recognized the existence of extracurricular funds not administered either directly or indirectly by the board of education.[23]

If a school district makes a profit through some extracurricular activity such as a football game, the endeavor might be considered a proprietary function by a court of law. In states where governmental immunity prevails, the courts might permit recovery in tort liability cases if the injuries were sustained while the school district was performing proprietary functions.[24]

Numerous plaintiffs have brought suit on the ground that the board of education was engaged in a private or proprietary activity for which it could not claim immunity from tort liability. This legal approach is particularly common in actions to recover damages for injuries sustained in connection with extracurricular events, namely interscholastic athletic contests for which admission was charged.

The courts have been unable to agree on a precise distinction between governmental and proprietary functions; consequently, it is difficult to determine into which category a given activity will be placed until after a court has ruled. A Pennsylvania court declared that an athletic contest for which admission was charged was a proprietary activity which was outside the authority of the school district to perform.[25] The court therefore rendered a decision favorable to the plaintiff who was injured while attending a football game. Similarly, the Supreme Court of Arizona ruled that a school district by leasing its stadium had engaged in a proprietary act and that it could be held liable for injuries sustained as a result of its negligence to maintain the stadium.[26] The Pennsylvania Supreme Court more recently declared that a school district which offered a summer recreation program, not part of the school curriculum and for which admission was charged, was conducting a proprietary activity and was therefore liable, because of negligence, for the death of a girl who drowned in the swimming pool.[27]

Not all courts have been willing to declare that a school district can be held liable for injuries resulting from negligent acts of its employees when such acts are associated with an activity which might be classified as proprietary. When a woman, injured by a baseball which came through a protective screen which had been negligently permitted to deteriorate, sought damages on the ground that the board of education was liable because the activity was a proprietary one, the District Court of Appeal of Florida failed to be persuaded by her argument even though she cited the Hoffman[28] and Sawaya[29] cases in support of her claim.[30] The court asserted that any change in the immunity doctrine would have to come about by constitutional amendment or by the passage of appropriate legislation, or both.

The supreme courts of Minnesota[31] and Montana[32] upheld the doctrine of governmental immunity by ruling that the charge of admission did not change a school district's activity from a governmental to a proprietary classification. Other courts have ruled that interscholastic athletics are part of the physical education program and cannot be designated as proprietary activities,[33] and that a school district definitely performs a governmental function by providing for interscholastic athletics.[34]

There is, however, a difference of opinion among the courts of the various jurisdictions in regard to which activities are governmental and which are proprietary. A Tennessee court held that a school district, because of its legal status, could conduct itself in no other than a governmental capacity;[35] yet, a court in Pennsylvania ruled that while the actual athletic competition of interscholastic events was a governmental activity, its presentation to the public for a charge was a proprietary enterprise.[36]

Although the consensus is not unanimous, the majority of the courts have ruled that the board of education does not operate outside of its governmental capacity by supporting enterprises which produce funds for the support of extracurricular activities. Nevertheless, the courts have not established any sound legal principle that can be applied universally to situations involving the distinction between governmental and proprietary functions.

RULES AND REGULATIONS INVOLVING PUPILS

Although most state constitutions provide for a uniform system of public schools, it is not mandatory for every school to offer identical programs or even provide identical educational opportunities for each of its pupils. The welfare of the state, the primary purpose of public education, requires that limits be placed on the freedom of individual pupils by imposing such rules and regulations as are required for the efficient government of the school. In the course of governing a school it is necessary to enforce regulations which control the activities of pupils. School boards have the authority to make rules and regulations which, in the interest of promoting the objectives of the school, prohibit certain pupils from participating in the total school program.

There is, however, a point beyond which school officials cannot go without violating individual rights guaranteed by the United States Constitution. This point is determined by the courts on the basis of the reasonableness of the regulation involved in each case. Rules and regulations pertaining to extracurricular activities which are most frequently challenged as being arbitrary, unreasonable, and discriminatory are those restricting secret society members and married students to classroom activities.

The courts in Washington,[37] North Carolina,[38] Texas,[39] Arkansas,[40] Kansas,[41] and Ohio,[42] have upheld the right of a school board to restrict secret society members to classroom activities. A resolution passed by the Chicago Board of Education which prohibited secret society members from representing the public schools in literary and athletic contests was upheld by the Supreme Court of Illinois.[43]

The only court to render a decision adverse to the school board was the Supreme Court of Missouri.[44] The majority of the court reasoned that there was nothing shown to prove that the conduct of secret society members was detrimental to the discipline and control of the school. The court therefore concluded that a regulation prohibiting secret society members from participating in extracurricular activities was unnecessary and beyond the discretionary power of the board of education to enforce.

In an effort to discourage high school marriages, some school boards have passed resolutions barring married students from extracurricular activities. Although it is questionable whether a school board can legally restrict married students to classroom work, the courts, in the few cases involving this question, have always ruled in favor of the board of education.

The courts in Texas,[45] Michigan,[46] Ohio,[47] Utah,[48] and Iowa,[49] have concluded that a board of education has the authority to prohibit married students from participating in extracurricular activities. Although legal marrage is sanctioned by the law and is consistent with public policy, most school boards justify their restrictive policies as being necessary for efficient management of the schools. The increase in dropout rates and the undesirable influence over unmarried pupils are frequently given as reasons for such regulations.

In an advisory opinion by the Supreme Court of Michigan,[50] in a moot case, four of the justices in a 4-3-1 decision presented a view which might receive judicial notice in the future. They said that denying married students the right to participate in extracurricular activities was not a responsible exercise of school board authority, and that the action was arbitrary and unreasonable for no other reason than the fact that they were married.

In a 1967 case, the Supreme Court of Iowa upheld a board of education regulation prohibiting married students from participating in extracurricular activities.[51]

By the time this case was appealed to the Supreme Court of Iowa, it was moot, but the court decided to hear it for the following reason: when the issue presented is of substantial public interest there exists a permissible exception to the general rule that a case which has become moot or presents only an academic question will be dismissed on appeal.

In upholding the rule prohibiting married students from participating in extracurricular activities, the court said:

> We do not consider the rule here in question to be violative of public policy in that it penalizes persons because of marriage. The law looks with favor upon this most vital social institution. However, that policy is basically referrable to those of lawful age who enter into the marital relationship. As to underage marriages the legislative policy is said to be otherwise.

Although they did not write a dissenting opinion, three of the justices reviewing this case dissented. There appears to be judicial disagreement as to the legality of rules and regulations restricting married pupils to classroom activities solely on the basis of their marital status. However, the courts have, without exception, upheld such rules and regulations.

In the area of civil rights, a board of education has no legal grounds for requiring or encouraging racial discrimination in extracurricular activities. The United States Court of Appeals, Fifth Circuit ruled that[52]

> . . . school officials should not discourage Negro children from enrolling in white schools, directly or indirectly, as for example, by advising them that they would not be permitted to engage or would (not) want to engage in school activities, athletics, the band, clubs, school plays.

Reaffirming what was stated in one of its earlier opinions,[53] the Fifth Circuit Court of Appeals said:

> . . . there should be no segregation or discrimination in services, facilities, activities, and programs that may be conducted or sponsored by, or affiliated with, the school in which a student is enrolled.

TEACHER ASSIGNMENTS

Litigation involving the teachers responsible for conducting extracurricular activities stems from two sources: disputes pertaining to teachers' contracts, especially those of athletic coaches, and teachers challenging the authority of boards of education to assign them extra duties unrelated to their teaching fields or for which they receive no extra compensation.

Boards of education have the authority to hire athletic coaches to conduct the extracurricular athletics program.[54] Although athletic coaches are subject to the same rules and regulations under their contracts as are other teachers, their athletic duties are not always included under the teacher tenure laws. In Massachusetts there is a statute which permits school committees to hire coaches for no longer than a three year period.[55]

The Illinois Supreme Court ruled that contractual continued service did not attach to extracurricular coaching duties when they were contracted for separately.[56] The District Court of Appeal of Florida came to a similar conclusion by declaring that the rights of tenure applied only to the subject area in which a teacher was certified by the state.[57] A business education teacher who was relieved of coaching duties had no legal basis to bring action against the board of education. The school board was not required by law to hold a public hearing, for they violated no rights of tenure by reassigning the teacher and coach to full time teaching duties.

In two instances supplementary compensation for coaching athletics was challenged as not being a part of the athletic coach's total salary which could be used for determining pension benefits. The New Jersey courts ruled that an honorarium received for coaching athletics was not part of a teacher's total salary used for determining the amount of pension to be paid to him upon retirement.[58] The Supreme Judicial Court of Massachusetts ruled that extra compensation for coaching duties, provided for in the regular salary schedule, was part of a coach's total salary under the pension law.[59]

Many extracurricular activities meet during out-of-school hours, either after school or on Saturdays. This situation creates a problem for the school administrators whose responsibility it is to assign teachers to supervise these activities. Problems most frequently arise when teachers are assigned, often without compensation, duties foreign to their teaching assignments such as supervising student spectators at athletic games, collecting tickets for various school events, and chaperoning school social functions.

The Pennsylvania Supreme Court ruled that a board of education had the authority to assign teachers duties for which they were properly qualified and certified, and their failure to perform such duties would make them guilty of willful and persistent negligence for which they could be dismissed.[60] The Supreme Court of Rhode Island declared that a school committee had the authority to assign extracurricular duties to its teachers so long as the rules and regulations did not violate the general statutes and teacher tenure law or were not in excess of the school committee's proper power.[61]

In a New York case the court said that a board of education could fix the hours of a teacher even to the extent of evening hours if the activity assigned was related to the teacher's field of certification.[62]

A court of common pleas in Pennsylvania declared that the assignment of a teacher to collect tickets at an athletic event was an improper assignment for a professional employee.[63] Had this teacher been assigned to supervise pupils in the cheering section, the court would have regarded the duty as one of educational significance within the authority of the board of education to assign.

A teacher in California brought suit against the board of education for assigning him supervisory duties at athletic games for which he received no extra compensation. The court ruled in favor of the school board by stating that a teacher's duties extend beyond the classroom and that such assignments, when reasonable and distributed impartially, were within the power of the board of education to assign.[64]

In a more recent case the Supreme Court of Pennsylvania ruled that a teacher may be assigned extra duties only if the activity to which he is assigned is related to the school program.[65] The assignment of a teacher to supervise a boys' bowling team which met at a local bowling center and which had no affiliation with the school was beyond the authority of the school board to make.

ATHLETIC ASSOCIATIONS

In every state and the District of Columbia there exists a voluntary high school association which supervises and controls extracurricular activities, interscholastic athletics in particular. All of these state associations except that of Texas are members of the National Federation of State High School Athletic Associations. The purpose of this national organization is to promote teamwork among the state organizations to further the cause of wholesome interscholastic activities among the secondary schools of the nation. The National Federation has also devised a type of legal insurance under which all state associations support a member in a lawsuit which reaches the state supreme court. All state associations have a direct interest in lawsuits of this nature because of the persuasive influence the decision might have in future cases in which the same or similar question might be dealt with by the courts of other states.

Voluntary associations have no legal entity apart from their members, and they must, in the absence of statutory provisions, sue and be sued in the names of their members. Before a school sues the association of which it is a member, all remedies of appeal within the association must be exhausted.[66] Even then, the courts will not interfere in the internal affairs of a voluntary association unless law and justice so require as in a case where property rights are violated.

School boards have the authority to permit schools under their direction to join high school athletic associations.[67] By becoming a member of a high school association a school assents to abide by the constitution and rules and regulations of the association.[68] Any violation of the constitution or rules and regulations of a high school association may result in the member's suspension or expulsion from the association.[69]

The courts do not have the authority to interfere with the operations of high school associations so long as all internal activities are conducted according to the constitution and rules and regulations of the association and no property rights are violated.[70] Athletic associations have been upheld by the courts in their regulation of contracts made by member schools so long as provisions for such regulations were present in the constitution or by-laws of the organization.[71] In the absence of mistake, fraud, collusion, or arbitrariness the courts have upheld athletic associations in their awarding of harsh penalties for the violation of rules and regulations so long as these penalties were provided for in the constitution or by-laws.[72]

Because of their supervision and control of extracurricular activities, high school athletic and activity associations appear to operate in an extralegal capacity, outside the framework of the state governments which are responsible for public education. However, there are no cases in which a high school association has received an adverse decision in the courts of record when the authority of the association to control public school activities was challenged.

SUMMARY

I. FINANCE

1. Generally, school districts may use tax-derived income to finance extracurricular activities.

2. Proceeds of extracurricular activities are public funds and must be accounted for in the same manner as all other school district funds.

3. In states where governmental immunity prevails, the courts might permit recovery in tort liability cases if the injuries were sustained while the school district was involved in what the courts define as proprietary functions.

II. RULES AND REGULATIONS INVOLVING PUPILS

1. School officials may prohibit secret society members from participating in extracurricular activities or from representing their schools in public contests, if membership in the secret society is proved to have detrimental effects on the good order and discipline of the school

2. The courts have upheld the authority of school boards to prohibit married students from participating in extracurricular activities, but there is some indication that this trend might be reversed.

3. School officials cannot legally prohibit or discourage pupils from participating in extracurricular activities because of their race.

III. TEACHER ASSIGNMENTS

1. Although athletic coaches are subject to the same rules and regulations under their contracts as other teachers, their athletic duties are not always included under the teacher tenure laws.

2. A board of education can assign teachers extracurricular duties for which they are qualified and certified so long as the activity is related to the school program and the general statutes and the teacher tenure laws are not violated.

3. Generally, a teacher can be assigned extra duties such as supervision at an athletic event so long as such duties are reasonable and assigned impartially.

IV. ATHLETIC ASSOCIATIONS

1. School boards have the authority to permit schools under their direction to join high school athletic associations.

2. Upon joining a high school athletic association, a high school must abide by the rules and regulations of the association or risk the penalty of suspension or expulsion.

3. Before a school sues a voluntary association of which it is a member, all remedies of appeal within the association must be exhausted.

FOOTNOTES

1. L. R. Kilzer, H. H. Stephenson, and H. O. Nordberg, *Allied Activities in the Secondary School* (New York: Harper and Bros., Publishers, 1956). p. 3.

2. *Alexander* v. *Phillips*, 31 Ariz 503, 254 Pac 1056 (1927).

3. *Board of Education of Louisville* v. *Williams*, 256 SW(2d) 29 (Ky,1953).

4. *Woodson* v. *School District No. 28, Kingman Co.*, 127 Kan 651, 274 Pac 728 (1929), *McNair* v. *School District No. 1 of Cascade Co.*, 87 Mont 423, 288 Pac 188 (1930), *Lowden* v. *Jefferson County Excise Board*, 190 Okl 276, 122 P(2d) 991 (1942), *Moyer* v. *Board of Education of School District No. 186*, 391 Ill 156, 62 NE(2d) 802 (1945), *Nichols* v. *Calhoun*, 204 Miss 291, 37 So(2d) 313 (1948), *Ranier* v. *Board of Education of Prestonsburg Independent School District of Floyd Co.*, 272 SW(2d) 577 (Ky, 1954).
   See also *Opinions of the Attorney General of Ohio*, 1961 No. 2479, pp. 528-32.

5. *Sorenson* v. *Christiansen*, 72 Wash 16, 129 Pac 577 (1913), *Commissioner of District of Columbia* v. *Shannon and Luchs Construction Co.*, 57 AppDC 67, 17 F(2d) 219 (1927), *Wey* v. *Ben Avon Borough School District*, 14 D & C 690 (Pa, 1930).

6. *Hill* v. *City of Providence*, 307 Ky 537, 211 SW (2d) 846 (1948), *Boney* v. Board of Trustees of Kingston Graded Schools, 229 NC 136, 48 SE(2d) 56 (1948). See also *Biennial Report of the Attorney General of Florida*, 1949-1959, No. 049-620, p. 290 and No. 049-475, pp. 308-09.

7. *Wilson* v. *Graves County Board of Education*, 307 Ky 203, 210 SW(2d) 350 (1948).

8. *Brine* v. *City of Cambridge*, 265 Mass 452, 164 NE 619 (1929), *Wright and Ditson* v. *City of Boston*, 265 Mass 452, 164 NE 619 (1930).

9. *Galloway* v. *School District of Borough of Prospect Park*, 331 Pa 48, 200 Atl 99 (1938), *Kay County Excise Board* v. *Atchison, Topeka, and Santa Fe Railway Co.*, 185 Okl 327, 91 P(2d) 1087 (1939). See also *Opinions of the Attorney General and Report to the Governor of Virginia*, July 1, 1961 - June 30, 1962, pp. 216-17.

10. *Schmidt* v. *Blair*, 203 Ia 1016, 213 NW 593 (1927).

11. *Beard* v. *Board of Education of North Summit School District*, 81 Utah 51, 16 p(2d) 900 (1932).

12. *Carothers* v. *Board of Education of City of Florence*, 153 Kan 126, 109 P(2d) 63 (1941).

13. *State ex rel. North Carolina Utilities Commissions* v. *McKinnon*, 254 NC 1, 188 SE(2d) 134 (1961).

14. *Opinions of the Attorney General of California*, January-June 1947, Vol. 9, No. 47-38, pp. 151-52.

15. *Opinions of the Attorney General of Indiana*, 1962, No. 46, pp. 245-47 .

16. *Brooks* v. *Elder*, 108 Neb 761, 189 NW 284 (1922), *Merryman* v. *School District No. 16*, 43 Wyo 376, 5 P(2d) 267 (1931), *Beard* v. *Board of Education of North Summit School District*, 81 Utah 51, 16 P(2d) 900 (1932).

17. *State Tax Commission* v. *Board of Education of Holton*, 146 Kan 722, 73 P(2d) 49 (1937).

18. *Southwestern Broadcasting Co.* v. *Oil Center Broadcasting Co.*, 210 SW(2d) 230 (Tex, 1947), *Colorado High School Activities Association* v. *Uncompahgre Broadcasting Co.*, 300 P(2d) 968 (Colo, 1956).

19. *Royce Independent School District* v. *Reinhardt*, 159 SD 1010 (Tex, 1913), *Hansen* v. *Independent School District No. 1 in Nez Perce Co.*, 61 Idaho 109, 98 P(2d) 959 (1940).

20. *Carter* v. *Lake City Baseball Club*, 218 SC 255, 62 SE(2d) 470 (1950).

21. In re German Township School Directors, 46 D & C 562 (Pa, 1942), Petition of Auditors of Hatfield Township School District., 161 PaSuper 388, 54 A(2d) 833 (1947).

22. Board of Education of Anderson Co. v. Calvert, 321 SW(2d) 413 (Ky, 1959). See also Commonwealth of Kentucky ex rel. Breckinridge v. Collins, 379 SW(2d) 436 (Ky. 1964).

23. Betterson v. Stewart, 238 SC 574, 121 SE(2d) 102 (1961).

24. See Morris v. School District of the Township of Mount Lebanon, 393 Pa 663, 144 A(2d) 737 (1958).

25. Hoffman v. Scranton School District, 67 D & C 301 (Pa, 1949).

26. Sawaya v. Tucson High School District of Pima County, 78 Ariz 389, 281 P(2d) 105(1955).

27. Morris v. School District of the Township of Mount Lebanon, 393 Pa 633, 144 A(2d) 737 (1958).

28. Hoffman v. Scranton School District, 67 D & C 301 (Pa, 1949).

29. Sawaya v. Tucson High School District of Pima County, 78 Ariz 389, 281 P(2d) 105 A(2d) 737 (1955).

30. Buck v. McLean, 115 So(2d) 764 (Fla, 1959).

31. Mokovich v. Independent School District of Virginia, No. 22, 177 Minn 446, 225 NW 292 (1929).

32. Rhoades v. School District No. 9, Roosevelt Co., 115 Mont 352, 142 P(2d) 890 (1943).

33. Watson v. School District of Bay City, 324 Mich 1, 36 NW(2d) 195 (1949), Thompson v. Board of Education, City of Millville, 12 NJSuper 92, 79 A(2d) 100 (1951).

34. Richards v. School District of the City of Birmingham, 348 Mich 490, 83 NW(2d) 643 (1957).

35. Reed v. Rhea County, 189 Tenn 247, 225 SW(2d) 49 (1949).

36. Martini v. Olyphant Borough School District, 83 D & C 206 (Pa, 1952).

37. Wayland v. Board of School Directors of District No. 1 of Seattle, 43 Wash 441, 86 Pac 642 (1906).

38. Coggin v. Board of Education of City of Durham, 223 NC 763, 28 SE (2d) 527 (1944).

39. Wilson v. Abilene Independent School District, 190 SW(2d) 406 (Tex, 1945).

40. Isgrig v. Srygley, 210 Ark 580, 197 SW(2d) 39 (1946).

41. Andeel v. Woods, 174 Kan 556, 258 P(2d) 285 (1953).

42. Holroyd v. Eibling, 188 NE(2d) 208 (CP, Ohio, 1961), 188 NE(2d) 797 (Ohio, 1962).

43. Wilson v. Board of Education of Chicago, 233 Ill 464, 84 NE 697 (1908), Favorite v. Board of Education of Chicago, 235 Ill 314, 85 NE 402 (1908).

44. Wright v. Board of Education of St. Louis, 295 Mo 466, 246 SW 43 (1922).

45. Kissick v. Garland Independent School District, 330 SW(2d) 708 (Tex, 1959).

46. Cochrane v. Board of Education of the Messick Consolidated School District, 360 Mich 390, 103 NW(2d) 596 (1960).

47. Ohio ex rel. Baker v. Stevenson, 189 NE(2d) 18[illegible] (Ohio, 1962).

48. Starkey v. Board of Education of Davis County School District, 14 Utah (2d) 227, 381 P(2d) 718 (1963).

49. Board of Directors of the Independent School District of Waterloo v. Green, 147 NE(2d) 854 (1967).

50. Cochrane v. Board of Education of the Messick Consolidated School District, 360 Mich 390, 103 NW(2d) 596 (1960).

51. Board of Directors of the Independent School District of Waterloo v. Green, 147 NE(2d) 854, (1967).

52. United States v. Jefferson County Board of Education, 372 F(2d) 836 (1966).

53. Singleton v. Jackson Municipal Separate School District, 355 F(2d) 865 (1966).

54. School Committee of Salem v. Gavin, 333 Mass 632, 132 NE(2d) 396 (1956).

55. Annotated Laws of Massachusetts, Vol. 25, Chapter 71, Section 47A.

56. Betebenner v. Board of Education of West Salem Community High School District No. 201, Edwards Co., 336 IllApp 448, 84 NE(2d) 569 (1949).

57. State ex rel. Slater v. Smith, 142 s(2d) 767 (Fla. 1962).

58. Matthews v. Board of Education of Town of Irvington Essex Co., 29 NJ Super 232, 102 A(2d) 110 (1953), 31 NJSuper 292, 106 A(2d) 346 (1954).

59. Murphy v. City of Boston,337 Mass 560, 150 NE(2d)542 (1958).

60. Appeal of Ganaposki, 332 Pa 550, 2 A(2d) 742 (1938).

61. *McKeon* v. *Warwick School Committee*, 75 A(2d) 313 (RI, 1950).

62. *Parrish* v. *Moss*, 106 NYS(2d) 577 (NY, 1951).

63. *Appeal of Coronway*, No. 785, 38 DelCoRept 406 (Pa, 1951).

64. *McGrath* v. *Burkhard*, 131 CalApp(2d) 376, 280 P(2d) 864 (1955).

65. *Pease* v. *Millcreek Township School District*, 195 A(2d) 104 (Pa, 1963).

66. *State of North Dakota by Langer* v. *North Central Association*, 23 FSupp 694, 99 F(2d) 697 (ND, 1938).

67. *Colorado High School Activities Association* v. *Uncompahgre Broadcasting Co.*, 300 P(2d) 968 (Colo, 1956), *State* v. *Judges of Court of Common Pleas*, 19 OO(2d) 52, 181 NE(2d) 262 (Ohio, 1962).

68. *Morris* v. *Roberts*, 183 Okl 359, 82 P(2d) 1023, *Sult* v. *Gilbert*, 148 Fla 31, 3 So(2d) 729 (1941).

69. *Sult* v. *Gilbert*, 148 Fla 31, 3 So(2d) 729 (1941), *State* v. *Judges of Court of Common Pleas*, 19 OO(2d) 52, 181 NE(2d) 262 (Ohio, 1962).

70. *Morris* v. *Roberts*, 183 Okl 359, 82 P(2d) 1023, *Sult* v. *Gilbert*, 148 Fla 31, 3 So(2d) 729 (1941), *State* v. *Lawrence Circuit Court*, 240 Ind 114, 162 NE(2d) 250 (1959), *State* v. *Judges of Court of Common Pleas*, 19 OO(2d) 52, 181 NE(2d) 262 (Ohio, 1962), *Robinson* v. *Illinois High School Association*, 45 ILLApp(2d) 277, 195 NE(2d) 38 (1963).

71. *Sult* v. *Gilbert*, 148 Fla 31, 3 So(2d) 729 (1941), *University Interscholastic League* v. *Midwestern University*, 250 SW(2d) 587 (Tex, 1952), 255 SW(2d) 177 (Tex, 1953), *Colorado High School Activities Association* v. *Uncompahgre Broadcasting Co.*, 300 P(2d) 968 (Colo, 1956).

72. *Sult* v. *Gilbert*, 148 Fla 31, 3 So(2d) 729 (1941), *State* v. *Judges of Court of Common Pleas*, 19 OO(2d) 52, 181 NE(2d) 262 (Ohio, 1962).

THE DOCTRINE OF 'In Loco Parentis': PAST AND PRESENT

By

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I.

Statement of the Problem

Statement of the Problem

Since the earliest times in the history of civilization, man has strived to release himself from the boundage of ignorance. An historical development of education does not seem necessary for the purpose of this report; however, certain traditions, practices, doctrines, if you will, have evolved down through the ages which have had a particularly important impact on the history of education. One of these important doctrines seems to be loco parentis, in place of the parent.

Loco parentis seems to be a well defined and accepted practice looked upon by the courts of the English-speaking world with favor, and as necessary and proper for the maintenance of orderly school systems. From the days of the Twelve Tables in pre-classical Roman law to the most recent court decisions, loco parentis has flourished, and has aided educators and parents alike in the struggle to free children's minds from the dark periphery of ignorance.

No detailed historical treatment appears to exist, in literature pertinent to the field, concerning loco parentis.

The decision contained in Brown v. Board of Education, 347 U. S. 483 (1954), has caused many minority groups in the United States to wage an unending war to eliminate prejudice and abuse manifested against them. The tempo of this struggle has increased in the past few years. The courts of this land have been the greatest weapon used by these groups to equalize social, economic, political and educational opportunities. Other means, such as demonstrations, freedom marches, sit-ins, economic boycotts and riots, have been used to bring the public's attention to bear on critical issues in our society. Because of the vast amount of litigation brought before the bar by discontented minority groups, there seems to be a trend among the American people toward an increased awareness of their constitutional and statutoral rights and privileges. The courts are being used as the principle means to attain these rights and privileges. As an example, Drury and Ray stated that the majority of cases concerning student marriages have been reported since 1957.[1] Before 1957 there was a scarcity of cases on this increasingly important subject. In view of this, the American public will tend to broaden their horizons in their struggle against injustices and unequal opportunities to other fields. One of these related fields could be education, and particularly, the doctrine loco parentis.

Segregation in the schools of the United States has produced a vast amount of litigation in the courts. Beginning with *Brown v. Board of Education, supra*, this tide of law suits has risen to flood crest. *Loco parentis* might be next to fall under the critical eye of people seeking redress for slleged grievances. This might mean increased litigation to settle pupil suspensions, long hair cuts, short skirts, beltless trousers, pregnant and married students, student cars, *ad infinitum*. It might also involve something more subtle as in the area of decision-making on the part of guidance counselors, teachers and administrators, or in other words, a direct attack on *loco parentis*. Finally, this attack might come from parents as legal guardians of minor children, from college students, or from dissident minority groups found in every walk of life from big city ghettos to university campuses.

On the university level in this country, recent student demonstrations at the University of California at Berkeley, the University of Chicago, Amherst, Michigan State, the University of Kansas and New York University, for example, have reopened the question of university administrative power to curtail freedom of speech, set dormitory hours for women, and a host of other related problems which have been, in the past, safely protected by the doctrine *loco parentis*.

If the trend of increased agitation and litigation continues, what will be the position of the courts in relation to decisions pertaining to *loco parentis*? Will the courts maintain the long history of the doctrine? Will the courts erode the power of educators by handing down more liberally construed interpretations that will tend to limit administrative power to act under *loco parentis*? Or will they destroy the doctrine as some state courts in Wisconsin, Arizona, Minnesota and Illinois have destroyed the governmental immunity doctrines?

Purpose of the Study

The purpose of the study was to develop, historically, the doctrine of *loco parentis* from the Hammurabian period to the present.

Scope of the Study

The scope of the study encompassed the historical development of the doctrine *loco parentis* from Hammurabi's Code, Roman law and English common law, to the American concept of the doctrine as interpreted by the courts in this country. The study also encompassed the Roman family law of *pater potestas*, English domestic relations, American concepts of family rights and duties and the area of *loco parentis* that pertained to the American public elementary and secondary schools and universities.

Exclusions of the Study

The study did not include a summory breakdown of areas of litigation such as decisions relating to student cars, fraternities and hair cuts. These areas were used, however, as they related to the historical development of *loco parentis*. To include specific areas such as these in the study was deemed too large an undertaking and more rightly belonged in separate studies by themselves.

The study did not include a detailed history of court decisions arising out of Brown v. Board of Education, supra. No attempt was made to document such trends as indicated previously in the area of litigation resulting from an increased awareness of the American people as to their constitutional rights and privileges. This trend was deemed self-evident at the time.

A detailed analysis of recent militancy on college campuses was excluded from the study; however, certain data were used if it pertained directly to the doctrine loco parentis.

Justification of the Need for the Study

No comprehensive historical studies seem to be available on the doctrine loco parentis as outlined in this study.

Recent pressures placed on the courts, by minority groups, indicate a broadening of attack, by constitutional, legal and extra-legal means, on established traditional institutions. This broadening of scope by such groups seems to have had an emotional impact on other groups of people which could result in litigation in educational areas.

If trends in a more liberal interpretative vein can be detected in relation to education by the courts, educators should be made aware of them for their own protection. Also if trends can be detected that clearly point to a more liberal interpretation of the doctrine loco parentis and its salient points, present practices in terms of school management may be in serious jeopardy from litigation. Recruitment of able educators might be handicapped too because the threat of due process for faulty judgment, accidents, poor decisions, ad infinitum, would put them under undue stress and financial hardship. If patterns in interpretations by the courts of the United States of the doctrine loco parentis were found to be compatible with historical development of the doctrine, school officials would tend to feel more secure in the pursuit of their educational objectives from legal redress.

Procedures Used in the Study

The law library of the University of Kansas and State of Kansas, Watkins Memorial Library, and the private law libraries of Mr. M. C. Slough and Richard P. Royer, attorneys-at-law, St. Marys, Kansas, were used to compile the data used in the paper. Current topics, such as university demonstrations and recent litigations were gleaned from newspapers, periodicals, speeches and letters written to the author by officials on the university level. Legal citations were standardized by the Harvard Citation Handbook.[2]

II.

Hammurabi to Patria Potestas

When Cain was born to Adam and Eve, the historical precedent of parent-child relationships was established. The history of man's relations with his children has progressed from the ancient paternal authority of life and death supremacy over children, to the more humane and controlled authority of modern-day law.[3-4] However, the interum period has had a tumultuous but orderly history.

Man, by the fact of birth, has a natural right to control his children. Pufendorf said in the Seventeenth Century:

> "he who is . . . the owner of the thing is also owner of the fruits, so he who is the master of the body out of which the offspring was generated, has the first place in acquiring authority over the offspring."[5]

In the beginning, then, the relationship of parent to child was that of natural law. It was at best a cruel law in that the parent controlled his children much as a despot controlled his kingdom--without mercy, without justice.

In 2250 B.C., the Code of Hammurabi, sections 135 and 168, outlined in brief detail certain legal relationships that existed between father and child.[6] Here, then, was one of the first times a kingdom described the relationship in legal terms. The relationship at the time of Hammurabi dealt primarily with succession of property-rights and the establishment of the father as head of the household.[7] In effect, the code limited a parent's control over his children.

Apparently no further legal codification, in terms of parental authority over children, was undertaken to any degree from 2250 B.C. to the Roman period. However, religious groups and other government entities had perfected customs concerning this point over the years. From a legal point of view, we must go to the Roman law to find the thread of continuity.

One of the first pieces of Roman legislation was enacted about the middle of the Fifth Century B.C.[8] During this period the Twelve Tables were written down, thus becoming the first Roman legal code.[9]

In the beginning, Roman fathers had complete, absolute control of his children.[10] He was in reality a despot, and his word was law. We know of many instances where Roman fathers put their children to death for disobedience. During the age of Tacitus, however, the killing of infants was made unlawful.[11] The killing and selling of children was eliminated by the end of the Republic.[12] It was Hadrian who finally tempered parental authority with the maxim:

> "Patria potesta in pietate debet, non in atrocitate consistere."
> (Parental powers ought to consist in devotion, not in harshness.)[13]

Constantine forbade murder; infanticide was abolished under Valentinian and

Valen.[14] Thus the doctrine of paternal supremacy was gradually reduced, although the Roman civil law never wholly abandoned it.[15]

From these early attempts to contain and limit parental powers, came the doctrine *patria potestas*.[16] Briefly, this doctrine gave Roman parents certain rights over their children; marriage legitimized the resulting offspring. The concept of *liberum matremonium* indicated that marriage was not primarily thought of as a legal relation but as a status to place children in *potestas*.[17] Other nations, such as Sparta, Greece and Egypt had similar laws.[18]

The most significant principle for our purposes to come from *patria potestas* was the concept of the Roman *tutor*. As you will see, the doctrine *loco parentis* finds its first roots in the legal form of *tutor*.

Under Roman law, a *tutor* was primarily interested in property rights of his ward.[19] A father could appoint a *tutor* for his children in three ways: by testament, by the law itself, and by the authority of a judge.[20]

The role of the *tutor* was well defined.[21] For example, a *tutor* did not have the right of succession; a *tutor* could advise, sign legal papers, and carry on business for his ward. When the ward became of age, the *tutor's* role diminished. If a *tutor* tried to cheat his ward, the child had legal recourse to recover damages. The system of *tutor* seems to have lasted until the end of the Fourth Century A.D.[22]

A number of important principles were established by Roman law by the Fourth Century A.D. Most singularly, parents had the right and responsibility to raise their children, to chastise them when necessary and to provide for their future in terms of property and succession. Parents also had the right to appoint another adult to act as a *tutor* or guardian for their children. Gaius mentioned in one of his codes that a *tutor*, or guardian, acted as *patroni loco.*

From this important base, parents have delegated their responsibilities and duties to others as society and culture became more complex. Both Blackstone, in his *Commentaries*, and Pufendorf stated in effect:

> . . . although the obligation to educate their children has been imposed upon parents by nature, this does not prevent the direction of the same from being intrusted to another, if the advantage or need of the children require, with this understanding, however, that the parent reserves to himself the oversight of the person so delegated. Hence also a father has not only the right to intrust the instruction of a son to suitable teachers, but can also give the son in adoption to another. . .[23]

It seems apparent, therefore, that Roman law laid the bases for the legal delegation of parental authority from the father to another person. The *tutor* became, then a quasi-legal guardian of the child, and as Gaius stated, stood *patroni loco*.

The system of tutela evolved from the Roman law and passed to other countries. For example, an Imperial Statute in 1548 in Germany required "electors, princes, prelates and other authorities to see to it that suitable tutors . . . were appointed for pupils and minors."[24]

An important legal milestone had been reached with tutela. A second major step in the development of loco parentis was the emergence of the legal right of parents to delegate to another party the authority to punish their children. Schouler pointed out when a parent delegated his authority to educate, he delegated his authority to punish as well.[25] In early times, however, this authority was not tested or at least no record survives. The trend was manifest, however, in the law if not in the courts. Grotius said on this subject and, in effect, outlined a guideline for punishment when he wrote:

> "From the very nature of the case it is sufficiently clear that punishments which leave neither loss of reputation nor permanent injury, and which are necessary by reason of the age or another characteristic of the person punished, provided that they are inflicted by those who have the right to inflict them according to the laws of men, as by parents, guardians, masters or teachers, are in no way contrary to the teachings of the gospel."[26]

In summary, Roman law laid the basis for three legal principles:

1) parents had a duty to educate their children
2) parents had a right to delegate their authority to another person
3) parents, when delegating their authority to another person, delegated the right to punish their children as well.

III.

The Christian Era, England and the Common Law

The early Christian Church maintained the law throughout the so-called middle or dark ages. Without the Church's instruction in the Code and Digest dispensed through Paris and Bologna, ancient law might very well have disappeared.[27]

Through the efforts of Julius Caesar and St. Augustine, Roman and Church law found its way to England.[28] The Church maintained the law after Rome's fall and added its own.

One of the first English laws concerning domestic relations and guardianships were written in the period 673-685 A.D. These laws were very similar to Roman law in that they pertained primarily to succession rights and guardianship.[29]

During the reign of Alfred the Great, 871-900, guardianship laws were passed and a rudimentary educational system was started.[30] The succession of William in 1066 brought to England a more refined but complicated law--feudalism. Wardship, under feudalism, apparently evolved from Henry the First's Charter of Liberties of 1176.[31]

The Church and political laws of England were separated in 1072 when temporal and ecclesiastical courts were divided.[32] The Constitution of Clarendon in 1164 further defined the separation of Church and State.[33] *Caudrey's* Cases, Kings Bench, in 1591, continued the policy.[34]

The practice of Roman *Tutela* and guardianship under the Kentish Kings, Alfred and William, carried forward the doctrine *patroni loco* into English common law. King John, when he signed *Magna Carta* in 1215, also signed a provision that pertained to wards and guardians.[35] The trend of *potestas*, *tutor*, wards and guardians seems to be unbroken in its history. The principle of delegation of authority in English common law also seems to be upheld at this point. Blackstone underscored this point in the *Commentaries* when he uses the term *loco parentis* for the first time in discussing parent-child relationships. He said:

> . . . He may also delegate part of this parental authority during his life, to the tutor or schoolmaster of his child; who is then in *loco parentis*, and has such a portion of the power of the parents committed to his charge, that of restraint and correction as may be necessary to answer the purposes for which he is employed.[36]

The doctrine *loco parentis*, before the emergence of common education in England, found its strength in the apprentice system of the 1500's.[37] The apprentice system was based on the principle of master and servant, with the master standing in *loco parentis* to the servant.

In 1601, Parliament passed a law, 43 Eliz. C.2, concerning relief of the poor. This act upheld *loco parentis*, but the Church took the place of the patron. The point, however, is that the state assumed the authority to delegate parental powers to other persons, and in this case, the Church.

In 1660, Parliament passed a law that perpetuated guardianship as a legal authority to educational matters only.[38] The importance of this law to the doctrine *loco parentis* was the fact that since guardianship and *loco parentis* originated together, one apparently was tied to the legality of the other. Such was the power of schoolmasters that one could say to King Charles II,

> "Pull off thy hat, Sire, for if my scholars discover that the King is above me in authority here, they will soon cease to respect me."[39]

The tracing of the words, *loco parentis*, led to various sources, one of which was English literature and more specifically, Doctor Johnson. Johnson applauded *loco parentis* and the resulting disciplinary authority, but, in a wise and prophetic remark to Lord Mansfield in the Court of Sessions, April 14, 1772, said, discipline (severity) is the way to govern boys or men, I know not whether it is the way to mend them.

England, in 1772, generally accepted the fact schoolmasters had the right to beat students with little fear of litigation from outraged parents. Johnson said:

> "A schoolmaster has a prescriptive right to beat; and an action of assault and battery cannot be admitted against him unless there be some great excess, some barbarity."[41]

The right of a parent to delegate his parental authority seemed to be generally accepted by 1772 in English common law.[42] Coupled to this point is the right of another person to punish children. One might notice a slight reservation by some, especially Johnson, concerning reasonable punishment. However, with the advent of compulsory education acts in England, the issue was forced to a head and from 1802 onward the tendency to settle master-pupil disciplinary suits in courts of law tended to be the rule rather than the exception.[43]

Reasonable punishment philosophies were introduced into English common law after 1802. English common law introduced one change that had really begun with Hadrian: "Common Law is far more discreet and parents have a moderate control over their children which relaxes as the child grows older."[44] This tended to place a ceiling on parental authority where discipline was concerned. It follows when parents were forbidden to punish children unreasonable, schoolmasters also were limited.

IV.

Benchmark Cases in English Common Law

Brow v. Howard. 14 Johns R. 118 (1817), established the doctrine of loco parentis on the high seas when a ship's captain was held to be master and to have parental authority in disciplining his crew.

Ex partre McClellan. 1 Dowl. P. C. 81 (1831), citing 56 Geo. 11, C. 100 and 31 Car. 2, re-established the legal authority that fathers had the right to custody of children and could delegate their authority to punish to others.

The true legal test of loco parentis did not come to England until 1865. In Fitzgerald v. Northcote. 4 F. & F. 656, 173 reprint 734 (1865), the point was settled that schoolmasters had the right to punish their scholars. The case cited 7 Edw. IV, saying, "the position of the schoolmaster appears to be that of a temporary guardian. . ." and ". . .schoolmaster can chastise a scholar. . ." (2 Edw.IV.). Later in 1893, Cleary v. Booth. 62 LJM, M.C. 87, citing Gardner v. Bygrave. 53 JP 743, reaffirmed the right of school masters to punish pupils and stand in loco parentis to them. In 1908, the Childrens Act was passed, but later repealed by 8 Edw. 7.C, 67, which cited previous authorities and allowed schoolmasters to stand in place of parents. The Children and Young Persons Act of 1933, 23 & 24 Geo. V. C. 12, S. 1 (7), as amended, further solidified the doctrine in English educational law.

V.

Loco Parentis and the U.S.A.

It is not surprising to note the migration of the doctrine loco parentis to these shores. Since most of our early laws and customs were of English ancestry, it follows most early American law strongly resembled English common law. As time passed, however, American traditions and customs lend to the establishment of a common law system uniquely American in flavor.[45]

Frontier school systems in this country adherred to loco parentis and apparently its disciplinary practice was widespread. Early disciplinary practices were as severe here as they were in Old England during the Seventeenth Century. There are many records of beatings, floggings and severe punishments handed out to students by schoolmasters. Harvard, for example, enlarged the powers of the president and fellows in 1656 by specifying either fines of beatings in the halls "as the nature of the offense shall require, not to exceed ten shillings or ten stripes for one offense. . ."[46] The Free Town School of Dorchester in 1654 gave the schoolmaster full rights of the rod and forbade parents to interfere.[47]

Discipline in the nineteenth century was as rough as the society in which it existed. However, there are apparently no recorded law suits against public schoolmasters for unreasonable punishment prior to 1833.

However, Commonwealth v. Fell. 11 Hazard's Register of Pennsylvania 179 (1833), apparently ended the long drought. The Fell case established the right of schoolmasters to stand in place of parents and administer punishment in this country. The case also established some guidelines concerning unreasonable punishment in that a school master could not beat or strike a student about the head--any place else apparently, but not in the area above the shoulders.

The most cited case in the United States concerning loco parentis is State v. Pendergrass. 19 N. C. 365, 31 Am. Dec. 416 (1837). This case seemed to settle the question once and forever the right of a teacher to punish a child for disobedience. The court held:

> We, therefore, hold that it may be laid down as a general rule, that teachers exceed the limits of their authority when they cause lasting mischief but act within the limits of it, when they inflict temporary pain.

Pendergrass held that teachers were not liable for errors in judgment but "only for wickedness of purpose."

Pendergrass also laid down guidelines defining unreasonable punishment. The court said a schoolmaster:

> . . .may be punishable when he does not transcend the powers granted, if he grossly abuses them. If he uses his authority as a cover for malice, and under pretense of administering correction, gratify his own bad passions, the mask of the judge shall be taken off, and he will stand amenable to justice, as an individual not invested with judicial power.

The court elaborated further on the limits of teachers to punish students by demanding they administer punishment in accordance with the gravity of the sin; that they make no lasting marks, that they cause no injury to body or health and that punishment must not be inflicted from malicious motives. . .

Not all judges were of the same mind as the judge in the Fell and Pendergrass cases. In Cooper v. McJunkin. 4 Ind 290 (1853), another view of loco parentis and corporal punishment was presented. The judge said:

> The public seems to cling to a despotism in the government of schools which has been discarded everywhere else. . . where one or two stripes only were at first intended, several usually follow. . . Such a system of petty tyranny cannot be watched too cautiously or guarded too strictly. . .
>
> The very act of resorting to the rod demonstrates the incapacity of the teacher for one of the most important parts of his vocation, namely, school government. . .

Further, he said:

> It can hardly be doubted but that public opinion will, in time, strike the ferule from the hands of the teacher, leaving him as the true basis of government, only the resources of his intellect and heart. . .

As we can see, from these three cases, opposing viewpoints were polarized early in this country.

The courts have not given teachers carte blanche authority in the administration of corporal punishment. In the absence of statutory law prohibiting such practices, teachers stand in loco parentis.[48] If nothing unreasonable is demanded, the teacher has the right to direct how and when each pupil will attend to his appropriate duties and the manner in which a pupil demeans himself.[49] The Fell and Pendergrass cases established these precedents by 1837 and apparently they have survived intact to this day.

Compulsory Education

As school systems grew in this country and the frontier society settled down, states began passing compulsory attendance laws in an attempt to give everyone a minimum education. The first compulsory law was passed in Massachusetts in 1852 with all states having similar laws by 1918 or thereabouts.[50]

These laws placed a new emphasis and meaning on the doctrine as Seitz pointed out:

> . . .since the advent of compulsory education, the granting of such powers by the parents is no longer direct but rather comes about indirectly through the legislation of representative government.[51]

After compulsory education laws were tested in many states on constitutional grounds, namely New Jersey, New Hampshire and Indiana, loco parentis took on a new flavor and authority--that of the state.[52]

It would appear the states have enlarged the scope of loco parentis and in many states made it statutory. With this status, more and more cases began to appear before the bar, primarily dealing with unreasonable punishment.

Teachers' powers and duty seem to extend beyond the teaching and preservation of order and discipline in the schools, to matters affecting the morals, health, and safety of pupils.[53] Teachers seem to have this authority unless otherwise prohibited by statute.[54]

For example: teachers have no authority to exercise lay-judgment in the treatment of injury or disease suffered by a pupil:[55] however, a teacher may treat an injury in an emergency.[56] Reasonable health regulations, e.g., school nurses[57] and physical examinations[58] can be required and schools may outlaw public school fraternities.[59]

It also appears the authority of teachers reaches beyond the walls of the school building and can touch students on the way to and from school.[60] On the other hand, teachers cannot force students to take courses forbidden by parents unless specified by state law.[61]

Since the doctrine has been so well established and defined by American common law, the basic test in the courts seem to be whether the punishment, rules or regulations, are reasonable. Failure of a teacher to use mature judgment "amounts to negligence for which the teacher will be liable in event of pupil injury."[62] The courts, however, have allowed boards of education to make reasonable rules and to enforce them.[63] The courts have, in the past, hesitated to interfer with the judgment of a board in the interpretation of their rules and regulations.

State v. Lutz. supra, laid down in 1953 modern guidelines for reasonable punishment. The court said that punishment must be without malice, the pupil must know his error and be aware of his punishment; the punishment must not be cruel or excessive or leave marks; the punishment must be administered in the pupil-teacher relationship.

VI

The State and the Child

As everyone knows, the state has assumed a vested interest in the welfare of children "and the authority to protect them goes beyond the natural right and authority of the parent. . ."[64]

The state uses as its legal authority the Roman *leges* and *parens patriae*. Acting as *parens patriae*[65] the state "may, in proper case, assume the direction, control and custody of the child."[66] and accordingly, a parent's rights in respect for the care and custody of minor children are subject to control and regulation by the state by appropriate legislative and judicial action.[67] Such rights, as belonging to parents, may "be enlarged, restrained, and limited as wisdom or policy may direct, unless the legislative power is limited by some constitutional prohibition."[68]

Through its police power, states have undertaken a wide latitude of power with respect to parental freedom and authority over minor children[69] and have also assumed the power to limit the power of parents in their control over children.

State authority in the area of parental rights and power goes without saying in the twentieth century. The state, by passing compulsory attendance and education laws, has stepped between parent and child in terms of a parent's rights to educate his children.[70] If the state failed to require the parents to educate their children, parents would still have a moral obligation to do so. Conversely, the states have insisted that the welfare of children falls within their police powers, thus giving them the right and authority to educate them or even force children to attend school. The question here is both a legal and a moral one.[71]

VII

The State and the Teacher

The state has assumed the responsibility to educate the children who live within its boundaries. To insure the care and maintenance of schools, the states have passed legislation delegating authority to administer the schools to local school districts and through them to the administrator.[72] This power to administer schools has been delegated to the classroom teacher through the chief executive office of the board of education.

Thus it appears that the state has conferred upon teachers the right to stand in *loco parentis* to students.

The *1966 Yearbook of School Law* has said:

> . . .teachers are public employees and not public officers. 'However, his relationship to the pupils under his care and custody differs from the relationship of other public employees to the general pupil. Teachers, in a limited sense, stand in place of the parents. . .and in this position they possess such portions of the powers of parents over pupils as is necessary to discharge their responsibilities.'[73]

VIII

The University and Loco Parentis

During the early days of Universities, loco parentis enjoyed much the same judicial support as it did in public and private schools of the time.[74] However, the use of corporal punishment as a tool to maintain discipline and order has gone by the wayside. "Since this is no longer the custom, the implementation and enforcement of college rules have become more difficult."[75]

The old university interpretation of loco parentis was well stated by the court in a case involving Berea College in 1913:[76]

> College authorities stand in loco parentis concerning the physical and mental training of pupils. For the purposes of this case, the school, its officers and students are in legal entity, as much so as any family. And, like a father may direct his children, those in charge of boarding schools are well within their rights and powers, when they direct their students what to eat and where they may get it; where they may go and what form of amusements are forbidden.

In 1947, the Board of Regents of the University of Oklahoma was faced with a similar case (Pyeatte v. Board of Regents. 102 F. Supp. 407 (Okla. 1951) and a similar decision was handed down in the case by the United States Supreme Court substantiating loco parentis on the university level.

Loco parentis, at one time, was firmly grounded on the university level as witnessed by the reference to the Harvard incident and the two cases just mentioned, plus others. However, 1967 seems to be another story.

It seems now when children leave the home and go to the university, the doctrine ceases to be a functional, legal principle. At one time in the long history of loco parentis, universities used the doctrine effectively as witnessed. However, students tended to be younger in those days and apparently less mature. Since the turn of the century, the doctrine has been used less and less by university administrators to control students. There appears to be many reasons for this shift in the history of loco parentis on the university level. Students tend to be older while they attend college; some are married with families; most tend to be more mature; most seem to have more freedom in terms of parental discipline and control and most are more mobile than before. It would appear too, that the society in which they were raised has given them more moral and social freedoms. This same society seems to be in tumult, and as a result, standards are less rigidly defined than earlier. Recent campus demonstrations in this country in the past years tend to support this premise. The "Free Speech Movement" demonstration on the University of California campus at Berkeley, for example, has prompted many prominent citizens to defend the freedoms of students to investigate, inquire, object, demonstrate, criticize and learn.[77] There also appear to be dissenters among the tax-paying public and elsewhere who advocate more rigid policies to govern student behavior. However, loco parentis appears to be a thing of the past on the university level in this country.

In regard to loco parentis on the university campus Henry Steele Commager wrote:

> . . .The notion that the university should act in loco parentis to its students is a relatively new and limited one; to this day it is confined pretty much to English-speaking countries, and unknown elsewhere. The principle of in loco parentis was doubtless suitable enough in an earlier era, when boys went to college at the age of thirteen or fourteen; it is a bit ridiculous in a society where most students are mature enough to marry and raise families.
>
> No one will deny that manifestations of student independence occasionally get out of hand, just as manifestations of adult independence get out of hand; we should remember, however, that if there is to be excess, it is far better to have an excess of interest and activity than an excess of apathy. But the solution for student intemperance is not for university authorities to act in the place of parents. It is not the business of the university to go bustling. . . censoring. . .cutting out indelicacies. . .approving. . .accepting or rejecting. . .snooping. . . These matters are the responsibility of the students themselves.[78]
>
> . . . .
>
> So it is with punishment, by whatever means, of those who exercise their right to express ideas that are unpopular and seem dangerous. . . No doubt it is deplorable that. . .intelligent men should entertain, let alone champion, notions of this sort, but how much more deplorable if we had the kind of society where they could not. . .[79]

It appears that two opinions, concerning the evolving campus controversy, exist in this country. On one hand, some people have looked upon the demonstration as a rebellion of students and professors that should be controlled and eliminated by the proper authorities. Others have looked upon the campus uproars as manifestations of curious and answer-seeking youth; youth who seem to be involved in the problems of today and who seek solutions to the giant social questions that beseige our twentieth century world.

According to John R. Searle, Special Assistant to the Chancellor of the University of California at Berkeley, loco parentis is dead on the university level.

> It is my opinion the doctrine of in loco parentis had undergone serious changes in recent years. These changes are a reflection of changes in American society. Students entering universities today are more mature, better prepared and more independent than they were fifty years ago. For reasons such as these, the University of California no longer plays the role of a parent in guiding students' lives.[80]

The day of "parental control" of modern-day youth on America's college campuses by the officials in charge seems to be a thing of the past.

Searle appears to be striking a blow for student freedom which society apparently supports to some degree. Generally, when a child leaves his home and goes to the university he severs to some extent his family's disciplinary ties and acts independently of them. Parents have little control over their children on university campuses; it appears that universities do not have much more. Parental control of children tends to diminish by age seventeen or eighteen and responsibility of conduct seems to pass to the child. This practice tends to be supported by current social practices of early marriages among teenagers, the breakdown of family authority and the abrogation of family control in relation to social conduct and discipline. In other words, children now tend to act independently of their families at a much earlier age than ever before, and apparently with the blessings of the family. If this premise holds true, the doctrine of loco parentis is dead on the university level.

IX

Summary and Conclusion

The concept of loco parentis seems to be in a state of flux, expecially on the secondary level in this country. Public attitude toward corporal punishment has changed during the past twenty to thirty years. During the 1930's and 1940's corporal punishment was virtually abandoned, but now there appears some evidence that the pendulum is swinging in the opposite direction.[81] The cause of this change of mind has been laid to attacks on the public schools for its various shortcomings and the rise of juvenile delinquency.[82] Today, school management usually had incorporated some corporal punishment in its philosophy which has been sanctioned by the legislatures in many states.[83]

Since 1954 and Brown v. Board of Education, supra, an ever increasing flood of litigation has drowned the courts in cases involving racial segragation. Other areas of litigation such as dress codes, student cars, grooming, student marriage, pregnancy, not to mention college demonstrations, have caused many school boards and school administrators to search their pedagogical souls for answers as to how far the doctrine loco parentis can be stretched to cover the multitude of different problems presented in court today. Glenn reported:

> Perhaps by reason of more exacting compulsory attendance laws, better schools, and the vast diversification of curriculum offerings, our schools are populated with more of the extreme faddists and exhibitionists than were within the holding power of our schools a score or more years ago.[84]

This most certainly appears to be the case in a host of areas and is one point most people fail to recognize as significant. The revered one-room school house of a century ago had its bully and upstart; today's schools have scores of students, and a proportionally larger group of trouble-makers.

The flood-tide of litigation concerning loco parentis has not reached its crest at this time. If all trends hold true, our legal system will probably be submerged in the next decade.

Along with the increase of court cases in the United States over school problems, rests the spectre of a restless, troubled populace searching for freedom and justice in a free society. The civil rights movement has given some segments of the American public new hope in the quest for peace in a hostile social environment. The American public, as a result of on-going discussions in the area of social justice, has become more aware of their constitutional rights. The reasons for this awareness appear to be moot and one could only speculate as to the various other reasons for this social phenomenon; however, litigation in the courts has increased by most standards. People seem to be more willing to take their alleged grievances to court to be settled by law. As an example: At one time Jehovah's Witnesses were apparently the only segment of American life to be exempt from the flag salute. Now other groups, such as the Black Muslims, have asserted their rights and claimed the same privilege.[85] Schools can not feel free to regulate the style and length of haircuts in this social age without fear of litigation.[86] Great pressure has been placed on public institutions to treat everyone alike;[87] young married students, who, in an age gone by, were not allowed to attend public schools, now are welcomed at the discretion of the board of education.[88] Reasonable discipline for truancy must not be administered or used as an instrument of racial discrimination.[89] A young student who demonstrates against one of the social evils of this day cannot be disciplined in the schools for participating in such an event.[90]

Educators, because of their role in society, and their position to children in society, have given freely of their advice and experience to those who have requested it. In the event advice freely given to a child, for any reason, should fail, would the administrator or counselor be held liable? Years ago, the patrons of the free city of Dorchester would not have interfered, at least in the courts.[91] Today, however, seems to be another time. In Bogast v. Iverson. 10 Wis. 2d 129, 102 NW 2d 228 (1960), a school counselor was brought to court on the grounds that he was negligent in his treatment of his counselee. As a result of the alleged negligence, the counselee committed suicide but the court failed to hold the c counselor negligent on the grounds that the counselor did not give medical advice to his counselee; absence of such advice by a layman does not constitute negligence. If however, lay-medical treatment was offered, and some harm resulted, the educator would probably have been held liable. In any event, such litigation tends to be costly even if the judgment exonerated the defendant.

If educators must face their difficult task with the added fear of litigation over the slightest provocation, public and private teachers, administrators and board members might disappear from the American scene. When students take professors to court over failing grades, the task of education tends to become ridiculous.[92] To this extent, the courts have not diluted the power of the teacher to stand in place of the parent. The courts have, as in the past, consistently upheld the doctrine as a legal principle and perpetuated its authority into the mid-twentieth century. Only where educators have not been able to meet the criteria set by the courts down through the years, have teachers been held liable for any reason. As a result, loco parentis still stands unblemished as a bulwark of discipline and order in the public schools below the university level in this country.

The courts have tended to follow stare decisis in dealing with litigation arising under loco parentis concerning corporal punishment. On the other hand, problems such as university demonstrations have little precedent under the modern day interpretation of the doctrine. It does seem, at times, to fall under a reinforced and regenerated doctrine sometimes called academic freedom. This problem, in an earlier age, would have been handled by university officials under the doctrine loco parentis. This, however, was in an age gone by, and today's university administrator does not apparently have that disciplinary tool at his disposal.

If the courts were to define loco parentis and equate the doctrine to the recent upheavals on college campuses, would the administrative officials use the power to curb future demonstrations? Apparently they would not be so inclined.

The question on the university campus seems to revolve around "academic freedom" and its exercise. Academic freedom means not only the professor's right to teach, but should also be equated with the student's right to learn, question, experiment and study in a manner suited only to him. If limits were placed on students and professors in their search for "truth," the "academic truth" would probably not be realized. That is to say, abridgment of the student's freedom to learn, inquire, investigate and question and the professor's right to teach, might lead this country to a much more serious evil. However, some people, in times of national emergencies have urged such limits, especially when the questioning, investigating and inquiring touch on national issues and policies. The end result, in either case, tends to be the same. No one person or group should have the ultimate responsibility to set limits on what should be studied and questioned. Guidelines that limit such inquiry would tend to eliminate academic freedom.

The major question that must face all university officials, and for that matter, the entire country, would seem to be: When does academic freedom end and student nonsense begin? This question, in order to preserve the democratic way of life, must eventually end in the courts or in the office of the Dean of Students for settlement. Even then the issue might not be settled for it would take a prodigious amount of courage for an individual or group to take a stand on this question.

Loco parentis appears to be dead on the university level in this country. However, the doctrine seems to be very much alive on educational levels below the university. The question must be raised: will the doctrine retain its favored position on lower levels of education in the United States? The answer must remain moot; however, since universities have apparently recognized that our society's standards have changed in regard to disciplining of students on the college level and that their students have inherited more freedoms than have ever been know before, secondary schools and parental attitudes might follow the same reasoning. If this should happen, and there appears to be some evidence that lends support to this line of thought, public education could be in jeopardy. For example, more cases are brought before the bar each year involving loco parentis than ever before. Parental authority, in terms of discipline and control of children, seems to be degenerating each year. By placing these two items together, one can readily see dark clouds on the educational horizon. Loco parentis still appears to stand, however, as a valid, legal principle serving education in the United States.

If an era, such as the one in which we live at this moment continues its course, the complete democratization of society might tend to uproot and reorganize every tradition and institution in the land. *Loco parentis* might be negated by the courts as changes in the philosophy of discipline and freedom in our society occur. The ultimate end of such a movement could possibly be utter disorganization, chaos and autocracy. If personal rights and freedoms were so protected and defined by law, no one would be able to have his day in court because of the crush of case backlog. Complete freedom of personal rights never seemed to be the objective of the founding fathers of this country. Rather, freedom and personal rights were to be limited and guaranteed by a system of laws. The law, because of its flexibility, recognized academic freedom; it also recognized that such freedom must also be contained and limited by the law. The rights of individuals, whether parents, educators or children, have received protection from abuse by the law and will continue to be protected. Differences might exist, however, in the time it would take to mete out justice and by the expense of litigation. As long as such freedoms exist, the law and its doctrines will most likely persist and prevail.

FOOTNOTES

1. Robert L. Drury and Kenneth C. Ray. *Principles of School Law.* Appleton-Century-Crofts, New York, 1965, p.54.

2. *A Uniform System of Citation*, 10th ed. The Harvard Law Review Association, Cambridge, Mass., 1962, pp. 1-124.

3-4. Irving Brown. *Elements of the Law of Domestic Relations and of the Employer and Employed.* The Boston Book Company, Boston, 1890, p. 75; J. E. C. deMontmorency. *State Intervention in English Education.* The University Press, Cambridge, 1902, p. 14.

5. Samuel von Pufendorf. *Elementorum Jurisprudentiae Universalis Libri, Duo*, Volume 2, translation by William Abbott Oldfather. The Clarendon Press, Oxford, 1931, p. 281.

6. Robert Francis Harper. *The Code of Hammurabi King of Babylon About 2250 B. C.* The University Press, Chicago, 1904, p. 2. See also: *The Oldest Code of Laws in the World*, translation by D. H. W. Johns. T & T Clark, Edinburgh, 1903.

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8. Hans Julius Wolff. *Roman Law, An Historical Introduction.* The University of Oklahoma Press, Norman, 1951, p. 55.

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LAW FOR EDUCATORS: ONE APPROACH

By

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A three-day seminar for about a dozen professors of school law was conducted at one of our large universities several years ago. University professors in some of the various disciplines were invited to meet with us and to indicate what they believed educators--particularly school administrators--should know about law. I recall how one of the young professors in the law school jarred some members of the seminar by his introductory comments. He chided us, as school people, for attempting to be expertise in the field of law. This law professor said that in this "do it yourself" age there were too many self-made lawyers outside the profession. He implied that the special study of school law was a farce, and that when school officials and personnel were confronted with legal questions they should consult legal experts--presumably attorneys or law professors.

Obviously some of us who had studied school law could not go along with this philosophy. Since the school is definitely a legal entity and education a function of the government, there is not a single thing that goes on in the school that does not have legal implications. Since many of the school problems with legal implications must be resolved at the moment they arise, the school administrator would have to have the legal expert at his side or on an individual telephone line constantly. Even then the specialized legal expert would likely be limited in resolving the legal problem because of its educational implications, with which he would be unaware because of his own limited professional arena.

Since law and school administration cannot be divorced, the desirable situation would be one in which the school administrator would have training in both school administration and law--possibly with a degree in education and a degree in law. A limited number of educators so fortunately qualified could be identified. It would be ridiculous, however, to suggest that school administrators should hold degrees in both education and law. It would be more ridiculous, though, to suggest that the school administrator should confine his studies and efforts to educational matters exclusively and to rely upon legal counsel in all school matters in which law is involved. A proper compromise would be for the educator, as well as any other citizen, to have a general concept of the law. As an educator, however, one should have a more specific understanding of the law as it applies to the educational profession and particularly as it applies to the position one holds or aspires to hold in the profession.

Now in dealing more directly with the topic assigned to me, I should like to discuss several areas of law which should be understood by educators as well as others--including legal experts. In so doing emphasis will be placed upon the governmental structure in which our schools operate.

Relation of the Federal Constitution to Public Education

A basic understanding which becomes more significant day by day has to do with the relation of the United States Constitution to public education. Since this document, which is the original source of all law, contains no specific reference to education and that, moreover, the Tenth Amendment to the Federal Constitution stipulates that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," it is no wonder that it is frequently assumed that the federal government possesses no constitutional authority to promote and to control education in the states, and that such authority resides exclusively with the states and the people thereof.

Shortly after our Republic came into being there were those who manifested concern about omission of education in the Constitution. The fact that there were no direct provisions nor specific references in the Constitution concerning education caused at least two presidents, Jefferson in 1806 and Madison in 1817, to recommend constitutional amendments which would specifically grant power over education to the federal government.

General welfare provisions: More recently the tendency has been not to attempt amending the Constitution, but rather to read into it certain implied powers of the federal government over education. Perhaps the most significant provision which has been interpreted as authorizing the federal government to participate in promoting education is referred to as "the welfare clause." Article 1, Section 8 stipulates that: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States. . . ."

Numerous other references to education may be found in the Constitution, which empower the federal government to participate in the promotion of education. As early as 1931, the National Advisory Committee on Education listed fourteen different excerpts from the Constitution which have in one way or another affected educational development in the United States.

The constitutional authority of Congress to tax and spend in support of education is now well established. Altho there has been no specific court case in this regard, there have been cases where the courts have ruled upon the constitutional authority of Congress to expend money for the "general welfare" in areas other than education but which would likely be equally applicable. For example, in Helvering v. Davis (1937), the court upheld the Social Security Act and thereby validated the expenditure of federal funds as an exercise of authority under the general welfare clause.

A greater future application of the legal principle that the federal government may tax and expend funds for the general welfare is suggested in the words of the Court: "Nor is the concept of general welfare static. Needs that were narrow and parochial a century ago may be interwoven in our day with the wellbeing of the nation. What is critical or urgent changes with the times." The tremendous increase of federal expenditure for educational purposes is ample evidence that times are changing and that the federal government is exercising its prerogative accordingly.

Human-rights provisions: In recent years "human rights" provisions of the Constitution have been more in the limelight. Altho the original Constitution contained a considerable number of safeguards for human rights, they have been spelled out more specifically in the Amendments. This has been evidenced in the recent court cases. The First Amendment and the Fourteenth Amendment have especially been involved in cases dealing with racial discrimination and religion in the schools. Less frequently the Fifth Amendment, dealing with self-incrimination, has been referred to in cases involving alleged subversive affiliations.

The First Amendment (1791) stipulates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ." It should be noted here that the First Amendment applied only to Congress. It left the states almost completely free to infringe the most basic human rights in any way their governments might wish. Not until the Fourteenth Amendment was adopted in 1868 did it become possible for the federal courts and Congress to "put the brakes" on state action governing human life.

The applicable portion of the Fourteenth Amendment stipulates: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

As the Fourteenth Amendment has been judicially interpreted neither a state nor the federal government has the authority to enact laws "respecting an establishment of religion or prohibiting the free exercise thereof."

Provision for a separation of powers: In addition to the aforementioned provisions of the Federal Constitution having educational implications, the Constitution also provides for the establishment and functions of the three main branches of the federal government. Article I provides for the legislative branch (Congress); Article II refers to the executive branch; and Article III deals with the judicial branch. Each of these three branches assumes authority and performs functions which have significant bearings on public education.

Significantly no one branch of the federal government has exclusive control over a school matter. For example, the legislative branch (Congress) may enact a law authorizing the expenditure of federal funds for school purposes; the executive branch (Department of Health, Education and Welfare) may impose regulations by which the funds are to be allocated; and the judicial branch (Federal Courts) may interpret the constitutionality of the act itself, and the manner of its executive implementation.

State Constitutional Provisions Pertaining to Education

If it is surprising to some that no direct reference to education is made in the federal constitution, it should be more surprising that many of the early state constitutions made no reference to education or schools. Of the twenty-three states forming the Union in 1820, ten had by that time made no mention of education in any of their constitutions. Now, however, each of the fifty states has included provisions for education in its constitution.

For over a century the tendency was to increase the number of provisions pertaining to education in the state constitutions, so that by 1912 the average number was 18. This trend, however, was thrown into reverse with the admission of the two newest states to the Union in 1959. Alaska and Hawaii have but three and five provisions about education in their respective constitutions. Many of the other constitutions have had the number of provisions pertaining to education reduced considerably in the amended drafts. This is in line with the modern concept that they should not be too numerous and detailed.

Regardless of the number of provisions in their constitutions, each of the fifty states--with one exception--has at least one provision in its constitution for the establishment of a public school system. Connecticut is the only state in the Union which does not have a general mandate in its constitution requiring the legislature to provide for a system of free public schools. Some authorities in school law would contend that just one such provision in the constitution would be adequate. They believe that additional detailed provisions would be superfluous and even detrimental.

Considerable variations of educational provisions are revealed in the fifty state constitutions. Some of the provisions are well-conceived and in keeping with the times; others are antiquated and inadequate to the extent of impeding educational progress. Any state constitution is wanting if it does not conform to the following principles:

(1) The state constitution should contain the basic provisions for the orgahization, control, and support of a state educational program.

(2) It should empower and direct the legislature to establish the general plan for carrying out the basic provisions so set forth.

(3) It should be broad enough to include all of the essentials for an educational program.

(4) It should exclude details which tend to limit or handicap the legislature in developing an adequate school system to meet emerging needs.

(5) It should include provisions which are applicable on a statewide basis.

(6) It should be uniform in its application to educational opportunities and minimum essentials.

(7) It should be in harmony with the provisions of the federal constitution.

Unfortunately many of the provisions in state constitutions concerning public education were hastily drafted, without much attention to principles such as those just mentioned. Once a constitution is adopted it is difficult to amend it. Nevertheless, the citizens--and particularly the educators--of each state would do well to evaluate the educational provisions in the state constitution and to eliminate or amend those which are objectionable. Despite the difficulties in amending constitutions, the importance of an unhampered and adequate state educational system justifies the effort.

State Statutory Provisions Pertaining to Education

In view of the fact that, within constitutional limits, the legislature possesses complete power over the public schools, it must also assume complete responsibility for the enactment of laws which are beneficial to the state educational system. Obviously many well-intended school laws are enacted which prove to be improper, inadequate, and unsatisfactory. It is the obligation of the legislature to repeal or amend such laws, as well as to enact others to meet the needs of the times.

In order for school laws to promote and facilitate a good educational program, they should be enacted and organized in conformity with sound principles of school legislation. The following general principles should be considered in the enactment of school laws:

(1) The laws should be in agreement with the provisions of the state constitution, which, in turn, should be in harmony with the provisions of the federal constitution. Disregard for this basic principle frequently leads to litigation.

(2) Even though statutory laws should be more specific than constitutional provisions, they should be general enough to enable state and local boards of education to function without needless handicaps and restrictions.

(3) The laws should be stated in unmistakably clear terms so as to convey precise intent of the legislation.

(4) The laws should be codified periodically and systematically--deleting or amending provisions which are obsolete. Some states have not re-codified their school laws within the past quarter century.

In view of the numerous inaccuracies and inadequacies of certain school codes, it is no wonder that school laws are not clearly understood and interpreted by educators and others who are expected to rely upon them. Legislators as well as educators would do well to appraise their school codes with respect to timeliness, clarity, and propriety. The cost of re-codification is small when compared with the cost of litigation growing out of misunderstanding of antiquated and vaguely written statutory provisions.

Local School Authority

There is considerable misunderstanding, even among educators, as to how the local school district fits into the total governmental pattern. In brief it may be stated that a school district is a territorial subdivision of the state assuming responsibility and exercising delegated authority over education within its boundaries.

Since the school district is the creature of the state legislature, its board of education possesses no common-law powers. The board's only function is to carry out the will of the state toward education as expressed by the state legislature. In so doing, a school board really functions as a legislative body itself over school matters within the boundaries of the school district. In general its limitations are only those expressed or implied in the state statutes, state constitution, or the federal constitution.

Misunderstanding regarding allocation of education control is most evident in city school districts. This situation is particularly due to the fact that, since the boundaries of a school district are often superimposed upon those of the municipality, their separate identity is not realized. In a strict legal sense, however, there ordinarily is no such thing as a "city school district." It is called that merely because it encompasses the geographical area of the city; but, in fact, it is actually a designated division of the state performing a state function and is completely independent from municipal control.

State Courts and the Schools

The courts of practically every state are called upon each year to settle some case of litigation involving the authority of the state legislature, a state educational body, or the officers of a subdivision of the state with respect to educational affairs.

The extent to which the higher state courts decide cases concerning the schools is indicated by the number of cases referred to in the Yearbook of School Law. According to the 1967 Yearbook, 280 cases were adjudicated in the courts of record. Of this number, 69 were in the federal courts, and all others (211) in the appellate courts of 40 states. Presumably hundreds were settled in the lower courts of the states and not appealed to the courts of record.

Alternatives for court procedures: Due to time and expense involved in court procedures, certain administrative agencies, such as state educational offices or the state board of education, have frequently been delegated judicial authority over routine educational issues which potentially could otherwise develop into litigation. Different opinions have been voiced with respect to the wisdom and validity of such procedures. Some claim it is justified by expediency, whereas others claim it obscures the relative functions of judicial and administrative bodies. At any rate the practice is common in certain states. For example, several hundred school disputes are settled in New York each year by the Commissioner of Education. Also, the New Jersey Commissioner of Education is granted by law extensive authority to render decisions concerning school disputes in New Jersey.

In other states, court procedures are often avoided by the opinions of the attorney general. Altho his opinions are not binding, and may possibly be reversed by court decisions, they are in general adequate enough to settle minor disputes. The attorney general serves in an advisory rather than judicial capacity. His main contribution in the area of education is to advise and guide the state department of education and the state board of education in formulating legal policies and preparing legal documents so as to be in conformity with the constitutional and statutory provisions of the state.

Then, too, the educator may seek counsel from an attorney, professor of law, or any other legal expert to aid in resolving a legal problem. In many instances it is wise to do so. (And perhaps this is what was meant by the comment of the law professor referred to in my introductory statement.) The more the educator knows about law the more likely he is to know where and when to go for legal counsel.

Unfair criticisms of judicial rulings: It is difficult to reconcile some of the criticism against the courts for unsatisfactory school law, rather than going to the source of that which causes the dissatisfaction. Despite the obsoleteness of many constitutional and statutory provisions pertaining to the schools, the public has been lethargic in action for repeal, amendment, or enactment of laws so as to make them more in tune with the times. Altogether too many antiquated, vague, and unconstitutional laws are retained on the statute books. Then, when the laws are violated or misinterpreted, litigation frequently ensues. Since the resulting court opinions are not likely to be satisfactory to both plaintiff and defendant, the court becomes the target of criticism and blame by the dissatisfied party.

There would likely be less protest and criticism of court decisions on school cases if there were a better understanding of the respective responsibilities of the legislative branch and the judicial branch of our government. The state legislature possesses exclusive authority to enact laws on matters relating to the schools except so far as restrained by the state constitution and the Constitution of the United States. The state judiciary, on the other hand, has no authority or responsibility to legislate. In brief, the proper function of the judiciary is threefold: (1) to rule on the constitutionality of legislative enactments, (2) to interpret laws, and (3) to settle disputes.

Cognizant of the possible encroachment upon the legislature's sphere of functions, the courts are constantly guarding against interference. Time and again the courts emphasize that they are not concerned with the wisdom or even the expediency of legislative acts. They accept the judgment of the legislative branch unless it is arbitrary, capricious, unreasonable, and without foundation.

Proper Application of Legal Principles

Thus far I have attempted to indicate the understanding which educators should have of the legal framework in which schools are established and operated. Although we have not referred to legal principles evolving from court decisions, it is important for the educator to be familiar with them. The accumulation of court decisions regarding educational issues serves as a set of legal principles to guide school administrators in the performance of their duties.

An important consideration of the application of legal principles is the probable effect on the school and the community. The fact that an administrative act is legal is no assurance that it is necessary or desirable. It may be performed in complete accord with a permissive law and sanctioned by judicial opinion, but if it results in community resentment and dissatisfaction, it might be better if it had not been performed at all. Legal principles are best applied when the schools are administered in conformity with the laws, but also in such a manner as to promote the best possible public relations.

In conclusion I should like to place emphasis on this statement: *the educator should respect and obey the law*. Of course, that statement is applicable to every American citizen, but it is particularly applicable to educators who are the exemplars for youth. The educator is in the most favorable position by his contact with students to build a society governed by rule of law.

EMINENT DOMAIN AND SCHOOLS

By

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When a school district attempts to secure property by eminent domain, the interests of the state often conflict with the interests of the title holder, and a critical evaluation of the conditions and values associated with the action is required. The variety, complexity, frequency, and importance of the issues raised in eminent domain proceedings can be expected to increase because of several factors.

One of these is the pressure of expanding population. Not only is our population increasing, it is also requiring new uses or greater amounts of the land available, for example, in construction of interstate highways, flood control projects, airports, civic centers, and so on.

Another factor which would seem to increase the incidence of eminent domain proceedings by schools is the expanding role of public education in our society. Larger numbers of students are to be educated as a result of population growth and the cultural requirements which result in a longer period of formal education and a greater proportion of the population who need education. The multiplying amount of knowledge available and the development of new methods of dealing with it also lend weight to the prediction that the resources involved in formal public education will be expanded. To provide these resources, public schools may be required to secure more property by condemning it.

Increasing concern for private rights is a third factor which may be identified as complicating eminent domain proceedings for public schools. When property was held or used entirely at the pleasure of the ruling sovereign, its approriation for public purposes posed less of a problem than in a constitutional republic whose people think in terms of "ownership" of private property. The question of private rights versus the public welfare may become academic in the future, but some of the recent cases before our courts indicate that it has not as yet. Concern for individual rights in the appropriation of property has been expressed recently in the following terms:

> ...when the state impinges upon substantial individual interests, whether of liberty or property, courts must go beyond the limited review of expenditures to consider whether the state's interest outweighs the individual's. . . .The lack of effective political safeguards also justifies increased judicial intervention. . . .forcing the state to justify its action seems required to prevent the use of eminent domain to deprive condemnees of fundamental rights.[1]

These three factors, the societal pressures of an expanding population in a limited environment, an increasing awareness of the function of education, and concern for private rights, prompted a study to identify and analyze the issues raised in litigation of eminent domain cases involving schools and colleges.[2] This report is a brief summary of some of the issues identified in the study and a commentary on a few cases reported since completion of the study.

By what authority does a school district exercise the right of eminent domain, and what limitations are there upon that authority?

There is general agreement that the authority for a school to exercise the right of eminent domain must be delegated by legislative act. Most of the opinions add the requirement that the delegation must be explicit, but in a few cases the delegation of authority has been implied to a limited extent. The two cases located on the issue of whether a school district may condemn property outside its boundaries have held that such property may not be taken unless the legislative authorization expressly provides otherwise.

Authority for schools to exercise the right of eminent domain is found in general eminent domain statutes, sections of school codes or school statutes, charters, statutes for special purposes, or statutes creating and organizing educational institutions. The question of which statute should apply to a given case has been the basis for considerable litigation, and there is no general conclusion that can be drawn from the school cases. It would seem that on occasion the judiciary has been called upon to remedy unsatisfactory legislative practices. A number of problems have resulted from the historical factor of specifying that schools and colleges follow procedures previously enacted for condemnation of right of way by railroad companies.

While the right of eminent domain has been referred to as a sovereign right, a number of limitations have been imposed upon exercise of the right by schools. Some of the limitations stem from constitutional provisions, such as the requirement that when private property is taken for public use, just compensation must be paid. Other limitations are a result of legislative enactment, such as provisions that an attempt must first be made to purchase the property, or that not more than a certain amount of land may be condemned. Limitations have also been imposed as a result of the legal traditions or precedents--the common law; for example, a requirement that the owner receive due notice of proceedings to take his property.

Constitutional limitations on delegation of the authority to exercise the right of eminent domain are applicable in all the States. Those most generally urged in opposition to the attempt to condemn property deal with just compensation, special legislation, and material in the statute not germane to the title. A liberal construction has usually applied to the latter plea and wide variety of subjects have been found properly within the title of acts providing either for schools or for condemnation. Most of the statutes have been upheld when challenged on the basis of class or special legislation. The requirement of just compensation has been strictly applied in some cases, but in other cases the wording of the statute has not been considered crucial as the "just-ness" of compensation is regarded as a matter for judicial determination.

For what purposes may a school or college condemn property, and how much need for it must be shown?

The function of education in society has been discussed in judicial opinions as a basis for determination of whether the taking of property by schools and colleges in eminent domain proceedings meets the test of public use. In one of the early cases on the subject, the court referred to the fact that the public usefulness and public necessity of education had been recognized by the legislature in establishment of schools. The fact that a particular locality of a State may benefit from a taking more than others will not prevent exercise of the right of eminent domain. Some relationship of the condemning agency to a government unit has been found in cases upholding the right of schools and colleges to take the property by condemnation.

Two cases adjudicating the right of a privately operated institution of higher education to exercise the right of eminent domain resulted in opposite holdings, but the cases are distinguishable on the basis of the facts involved. It would seem to be essential that for a privately organized and operated college or university to condemn property, the public must have a right on equal terms to benefit from the use of the property to be taken. This right is not denied by reasonable entrance requirements.

There is authority for condemnation of private property by a privately organized and operated university, but no case has been found in which a private school of less than college grade has attempted to exercise the right of eminent domain. It would be reasonable to assume that similar principles would apply, however, and that in a jurisdiction following a liberal test of public use, an institution not directly related to a governmental unit may be authorized by the legislature to exercise the right of eminent domain if the public has access to the benefits of the institution.

A wide variety of uses have been upheld when the condemnor is clearly a public agency, including schoolhouse sites, playgrounds, athletic fields, gymnasiums, golf courses, dormitories, parking lots, community centers, agricultural experiment stations, hospital construction, transportation, office buildings, and a junior college campus.

The "rule of reason" has been applied by the courts to the determination of the extent of need a school or college must show in order for property to be taken by condemnation. The opinions have generally interpreted the requirement of necessity liberally rather than making the necessity absolute. The amount of land that may be taken and the urgency or immediacy of its use have also been considered. Necessity has been held to require that the use for which the property is sought not be remote, indefinite or speculative, but no case has been located in which the school or college was prevented from taking a certain amount of property as long as statutory requirements were met.

Who decides if the use to be made of the property is public or if it is necessary?

A general conclusion to be drawn from the cases is that the court decides what is a public use. The determination of the question of necessity for exercise of the right of eminent domain is often left to the discretion of the legislature or the administrative board to which the legislature has delegated the right. This conclusion is subject to a number of important exceptions, however. In the jurisdictions of Alabama, Georgia, Louisiana, Michigan, and Oklahoma, there is authority for the judicial determination of the question of necessity. Decisions in Minnesota and Texas which emphasize the legislative determination of necessity involved state universities. The opinions in which the administrative determination of necessity has received approval have consistently reserved to the court the right to review the discretion of the condemnor. In only one case was the discretion of an administrative agency regarded as absolute, and the decision on this point could be considered eroded by a later decision in the same State.

It should be noted that in all of the cases decided contrary to the right of an educational organization to take property by eminent domain, the opinions held that determination of questions of public use and necessity were judicial functions. Conflicting opinions in Alabama, Illinois, Indiana, and Pennsylvania may be explainable partly on this basis.

A recent California case[3] has specified that in that State the determination of questions of public use and compensation is judicial but that the question of necessity is legislative. In this case the defendant alleged that the Board had no intention to use the land for school purposes within a reasonable time. The California Code of Civil Procedure provided that the Board's resolution passed by a two-thirds vote was conclusive evidence of three issues: 1. the public necessity of improvements, 2. the property in question was necessary for the improvements, and 3. the planning and location of the improvements was compatible with the greatest public benefit and least private injury. The trial court judgment for the defendant on the basis that the land would not be devoted to public use within a reasonable time was reversed because that question was held not to be justiciable. To defeat the petition for condemnation, the court added, the defendant would be required to show that the Board's real purpose was private.

What happens when two public agencies need the same property?

Condemnation of property already devoted to a public use as a public park by a school district has been permitted in a recent case, but the power of a school to take other public property has, in general, been limited. The other cases of competing public uses in which a school has been successful in condemning property involved factual situations in which the public use by the other agency was marginal or the use of the property by the school did not interfere with the pre-existing public use. The courts have held consistently that in the absence of express legislative provisions, a school may not condemn property already devoted to another public use, and only two cases, both of which were decided in favor of the school district, have been located in which such provisions were construed.

Property used for an annual fair has been held in a recent Maine case[4] to be subject to condemnation for school purposes. The Agricultural Society maintained that its property was devoted to public use and therefore exempt from condemnation. Public benefit was distinguished from public use on the basis that the Society was a private voluntary corporation chartered by the legislature, whose members may decline to execute the powers granted or may dissolve and abandon the organization. The court pointed out that the Society was not created by the legislature without consent of its members, was not a political subdivision, nor was it invested with any political or governmental functions.

The efforts of other public agencies to take property of schools and colleges have apparently met with greater success. The property of public schools has generally been found to be subservient to public highways and railroads on the theory that the location of a school is less critical than that of a public transportation artery. In many of these cases the paramount issue has been the measure of damages, the more necessary use having been conceded or uncontested.

A California statute provides authority for one public agency to condemn property to exchange for that of another. This statute was challenged recently on the basis that one public authority was unable to exercise power bestowed on another.[5] The court held that it was within the province of the legislature to designate one entity to condemn for another, and that the resolution of the Highway Department was prima facie evidence of public purpose. The appeal based on a lack of showing the consent to the exchange by the school district was dismissed because the issue had not been raised at trial. A constitutional objection based on a provision limiting the State to acquisition of parcels 150 feet from the closest boundary of public works failed as the provision was held inapplicable to the case.

A 1966 decision in New Jersey began as an action to enjoin construction of an interstate highway near a school or to order the Highway Commissioner to condemn the school property.[6] The trial court dismissed the case because there was no showing of physical invasion. The Appellate Division, construing the pleadings most favorably to the Board, said a hearing should be granted on whether the use of the school would be destroyed as alleged. On the appeal to the Supreme Court, the trial court dismissal was affirmed without prejudice as the plans for the highway showed no physical invasion or encircling of school premises. The opinion recited that the effect of the highway on the school was and would continue to be speculative until the work was completed.

Will a zoning ordinance prevent condemnation by a school?

Cases in which the condemnation of property by schools has been challenged because in violation of zoning ordinances concern the rights of two public agencies. All the cases located hold that zoning ordinances of a municipality, even though they are enacted under statutory authority, will not prevent condemnation of property by public schools also operating according to legislative provision. The references to location of schools in the zoning statutes have not been construed as grants of power to the municipalities. The power of eminent domain granted by the legislature to schools in these cases has been found to be greater than the police power granted to municipalities.

At what stage of the proceedings does a school secure rights?

Payment of the compensation award was a critical factor in determination of the stage of the condemnation proceedings at which the school secured rights. Where school buildings had been constructed before formal steps to acquire property were taken, the right of the school authorities to subsequently condemn the property without making compensation for the improvements has consistently been upheld.

Does property secured by condemnation revert when no longer used for school purposes?

The case authority is in conflict not only between jurisdictions, but also within some of the States, regarding the nature of the estate secured by public schools as a result of condemnation proceedings. Statutes provide for condemnation of a fee simple absolute interest in some States. In the absence of an express statutory provision, the courts of some jurisdictions have been reluctant to grant more than a conditional estate, probably because of the influence of the litigation concerning condemnation for railroad purposes. The rationale advanced for finding that an unlimited estate is taken has been that the payment of just compensation requires assessment as if the property will be held for school purposes for an indeterminate length of time, but even considering this argument, some courts have not been convinced that a school should require an unlimited interest in the property. Statutory provision for condemnation of property "for school purposes" has been interpreted to limit the estate and, on the contrary, to provide only that the property taken must be used for public purpose.

Some of the cases have simply litigated the issue of whether the property had been abandoned by the school authorities, and in each case the continuing interest of the school district was upheld.

How is the amount due the condemnee determined?

The constitutional requirement that private property may not be taken for public use without just compensation requires the development of standards for the measure of compensation. Market value has been traditionally accepted as a basic measure in school cases, and these cases are probably not unique in this respect. The facts of each case present problems of determining what may be taken into account by the jury in particular situations in its attempt to arrive at market value.

It seems clear that any benefit that might accrue to the owner from having a school located near his property has not been taken into account. There is some uncertainty in the school cases about the time at which the value of the property is determined, but it will usually be at the time proceedings are begun by the condemnor or the time of the jury verdict. Interest may be included in a condemnation award, but the school cases are not clear on the question of when it begins to run.

Where only a part of an owner's property has been taken, the measure of damages has been held to be the difference between the market value of the entire tract before the taking and the market value of the remainder after the taking. A school would not ordinarily be liable to damages for consequential injury because of taking property by condemnation, either to the owner or to adjoining owners.

In some of the cases where property of a school has been taken for another public use, the measure of damages has been regarded as the same as when private property is taken. Especially has this been true when the property taken has not been in use for school purposes.

Recent cases have developed the substitution cost theory as a means of compensating an agency whose property has no market value. The right of the school to compensation as a public agency has consistently been upheld. The necessity of the school holding and using the property for school purposes has been an important element in consideration of the amount of compensation it should receive.

What evidence may be used to establish property values?

The most advantageous use of the property has been regarded as an element that may be considered in arriving at the value of property sought by condemnation, but, in general, the courts have attempted to prevent speculative values from entering into the verdicts. Offers made in good faith by parties who were able to purchase have been considered evidence of value, but where there has been the slightest suggestion of collusion, the courts have been careful to prevent admission of an offer as evidence of value. The offer made by the Board as a prerequisite to condemnation has not been considered good evidence of the value of the property. The value of other property similar to or in the area of that sought by the school may be considered valid evidence, but this determination usually depends on the facts of the case. Improvements made by the condemnor before securing full title have been consistently held not to enhance the amount of the condemnation award, even when made by mistake or under a defective title. This situation has been clearly distinguished from the common law rule that improvements by a trespasser become the property of the owner. The valuation of property for taxation purposes has not been considered evidence of the market value of property sought by schools.

What are some of the procedural problems raised in the eminent domain cases of schools?

Condemnation has been regarded as a special proceeding, and does not fit the classifications of "legal-equitable," or "in rem-in personam." The consequences of this recognition have generally been to afford greater protection to the rights of the party whose property is sought.

A group of Illinois cases illustrate the influence of the statutes on the question of the proper parties to prosecute condemnation actions for schools. In that State, property is held in trust for schools by trustees or municipal corporations, and the decisions there have consistently held that the party holding title, rather than school authorities, should initiate the proceedings. Other cases lead to the conclusion that interests of third parties must be substantial before they can affect proceedings to condemn property for a school.

A liberal view has been taken by the courts regarding the pleadings in most school condemnation cases. It has been held uniformly that where the condemnor is required to allege the purpose for which the property is sought or that the property is necessary, a general statement is sufficient. Amendment of the pleadings has been approved in each case located where it has been an issue. Generally, a defendant is not required to answer the petition for condemnation, but in some of the cases where he has done so, his right to raise issues by pleading has been supported.

Two Illinois cases were decided for the condemnee because the notice of the meeting of electors to select a site was inadequate, but otherwise, the issue of site selection has been decided in favor of the schools. Where an election to select a site is required by statute, its terms must be followed, and the cases seem to have been decided according to the facts presented rather than by consistent legal principles. In jurisdictions where the site is selected by school authorities, their discretion has generally been respected.

In some States a resolution of the school board to condemn property is not necessary. Where it is a condition precedent to the right to condemn, the courts have been permissive regarding the board's expression of its will.

A recent Illinois case illustrates the point.[7] In answer to the Board's petition, the defendant alleged that there had been no official action by the Board. This allegation was denied by the Board and the defendant demanded the filing of the Board's resolution. The Board produced records which showed that the Board in executive conference had directed its attorney to proceed with condemnation and a later resolution to show ratification of the action of the attorney in compliance with oral instructions. A post-trial motion to dismiss was granted and an appeal taken only on the validity of the amended petition. The court commented that although school boards are not held to the highest degree of accuracy or formality, they must exercise their powers according to law and casual meetings of members purporting to transact official business have no validity. A statute providing for exemption from the requirement that meetings be public when acquisition or sale of property was considered would not validate informality nor eliminate the necessity for formal action or records of closed meetings. While the original petition may have been insufficient, the court held that its defects were "ultimately cured by the labored process of motion and amendment."

One of the opinions on the issue of notice suggested that the cases fall into three classes; those in which no notice is required, those in which intent to give reasonable notice was sufficient, and those following a strict view that the statute must provide for notice and its provisions be carefully observed. The validity of notice given has been upheld in all the recent cases located.

An attempt to purchase is required as a condition precedent to the right of condemnation by statutes in a number of States. In only one case was the evidence of an attempt to purchase considered insufficient. Some of the cases refer to good faith as the criterion for evaluation of the board's offer. At least two cases have been lost by schools because of lack of agency to negotiate for the owner. Some of the statutes provide that if the school cannot secure title for a reason other than inability to purchase, it may do so by condemnation, but this provision will not substitute for an attempt to negotiate where the owner is capable. If it is clear that the owner would refuse to sell at any price, the courts have said that no offer is required.

A statute of limitations banning an action for fraud or mistake after three years from the time of discovery was a critical factor in a recent California case.[8] The defendants in a quiet title action filed a cross-complaint alleging that a purchase agreement had been negotiated as a result of the Board and its attorney representing to the defendant that a condemnation action had been commenced when in fact there had not been a two-thirds resolution of the Board. The defendants also insisted that they had relied on a confidential relationship to the school officers. The report of the case deals with numerous questions of which orders were appealable and what issues of fact were raised by the pleadings. The decision seemed to depend on a finding that the defendants had not raised the issue until eleven years after the representations made to them, that the defendants had a duty to investigate and the means of knowledge. "Only after the property had increased in value, did they become attentive," the court noted. The court also held that there was no confidential relationship between defendants and the school officials. Much of the case report relating to condemnation would have to be classified as obiter dicta because the property was acquired by purchase.

Three Missouri cases have involved a challenge to the corporate existence of the school district, the oldest holding that the condemnation proceedings were invalid, and the two more recent cases holding that corporate existence may not be questioned except by the State.

The question of whether the school had funds to pay the compensation award was considered an inappropriate issue for the owner to raise in all but one of the cases located on the subject. A specific statutory requirement that the Board of School Estimate certify the amount required was involved in that case.

Evidence has been challenged on grounds of both admissibility and sufficiency to sustain the verdict in school condemnation cases. Minutes of board action have generally been held to be admissible. Some of the opinions refer to a reluctance of the appellate court to disturb a finding or verdict of the trial court. In one of the cases involving taking of school property by a railroad, the verdict was upset because contrary to the evidence on the amount of damage.

The attempts of a school to abandon condemnation proceedings have generally been successful. There is a conflict of authority on the question of whether a school is liable for costs and expenses upon abandonment of proceedings. In the school cases not involving abandonment, the problems of costs and fees have apparently been litigated infrequently, and the authority located could not be considered conclusive on this question.

It has been held that there is no absolute right to appeal from a condemnation award, and this right is frequently governed by statute. The right to appeal may arise only at appropriate stages of the proceedings and then perhaps only to a particular tribunal. On appeal, the courts have consistently held, issues may not be raised which were not raised at trial. When the record has been insufficient to give the appellate court the information necessary to a decision, the finding of the trial court has usually been upheld.

In general, similar principles regarding condemnation have been applied to educational institutions regardless of their grade level. Because of the fact that so few college or university cases were located, this conclusion must be regarded as tentative. The eminent domain cases seem to illustrate a possible effect of a closer relationship of colleges and universities to the state legislature than the public schools have as the latter are usually governed in part by a local unit of some type. One of the cases, in order to support the condemnation proceedings of a university, referred to the legislative authorization granted to the public schools.

A general conclusion to be drawn from the study is that there is considerable variation among the States regarding the exercise of the right of eminent domain by schools. These variations are due in part to differences in wording of the statutes, and there seem to have been few other logical explanations for the variations offered in the cases. Some of the variations in statutes, both within a State and between States, are due to differences in school district organization. While it may be beyond the scope of this study, the impression is inescapable that there could be greater uniformity between States and greater clarity within the States without sacrifice of important private or public rights.

FOOTNOTES

1. "State Constitutional Limitations on the Power of Eminent Domain," *Harvard Law Review*, 77 : 717, Feb., 1964, pp. 718, 720.

2. Wallace E. Good, "Judicial Decisions on the Exercise of the Right of Eminent Domain." (unpublished doctoral dissertation, Oklahoma State University, Stillwater, 1966).

3. *Anaheim Union High School District* v. *Vieira*, 51 Cal.Reptr. 94 (1966).

4. *Oxford County Agricultural Society* v. *School Administrative District*, 211 A. 2d 893, (Me. 1965).

5. *People* v. *Garden Grove Farms*, 42 Cal. Reptr. 118 (1965).

6. *Board of Education of Morristown* v. *Palmer*, 46 N.J.522,218 A.2d. 153 (1966).

7. *Goldman* v. *Zimmer*, 212 N.E. 2d 132 (Ill. App. 1965).

8. *Hayward Union High School District* v. *Madrid*, 44 Cal. Reptr. 268 (1965).

RACE RELATIONS AND THE SCHOOLS IN THE UNITED STATES: DECISIONS LEADING TO AND FOLLOWING *BROWN*

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Throughout the history of the Supreme Court of the United States, certain decisions have been announced which have had a lasting effect on social fabric of the nation. Among these are such cases as *Marbury v. Madison*[1] and *McCullough v. Maryland.*[2]

Perhaps the recent case which will be viewed in the future as being one of the most important of the twentieth century is *Brown v. Board of Education.*[3] In this 1954 case, the Supreme Court struck down the doctrine of "separate but equal" which had permitted the states to maintain segregated facilities in public education.

This decision was greeted by a highly emotional response: hostility and fear in some areas, gratification among some groups, uncertainty in many localities, and disbelief in some legal circles.

Opponents accused the high court of a sudden and unwarranted departure from precedent. They pointed particularly to the 1896 decision in *Plessy v. Ferguson*[4] in which the court had accepted the doctrine of "separate but equal" which had been announced by the Massachusetts court in the Roberts[5] case in 1849.

In Plessy, the court had said regarding a railroad car segregation requirement:

> Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally. . . .recognized as within the competency of the state legislature in the exercise of their police power.[6]

Actually, an impartial study of the courts' decisions during the twentieth century would have shown a gradual but constant movement away from the Plessy decision. One of these decisions was announced in *Gaines v. Canada*[7] in 1938. Lloyd Gaines, a citizen of Missouri, was denied admission to the state university because he was of the Negro race. Instead of admission, Gaines was offered tuition fees to attend an out-of-state school. He refused and sought a writ of mandamus to gain admission to the University of Missouri. In its decision, the Supreme Court held that Missouri was in violation of the "separate but equal" doctrine by utilizing out-of-state institutions. Each state was required to provide equal facilities within its own borders. The university was ordered to accept Gaines as a student.

The Gaines case served as a precedent a decade later in Sipuel v. Oklahoma Board of Regents,[8] when Ada Sipuel was denied admission to the University of Oklahoma Law School and no other law school was available to her in the state.

Two 1950 decisions showed clearly that the court's thinking was moving away from the Plessy rule. In McLaurin v. Oklahoma,[9] a Negro student who had been admitted to doctoral study at a state university complained that he was required to sit at different facilities in classes, at meals, and at study. The Supreme Court held that this handicapped the student in his pursuit of graduate instruction on the basis that interaction is a part of advanced work.

In Sweatt v. Painter,[10] when a Negro was refused admission to the University of Texas Law School solely on racial reasons, the court concluded that the education offered to him elsewhere was not substantially equal to that offered at the university.

In neither of the last two cases mentioned was it necessary for the court to review the Plessy decision because such a consideration was not essential to these decisions.

This leads us to the Brown case. In 1951, an action was brought in the United States District Court in Kansas by Oliver Brown against the Board of Education of Topeka. The state of Kansas had a statute authorizing cities of the first class to maintain separate elementary schools for white and Negro children. Acting under this statute, the Topeka schools segregated the races in elementary schools, and Brown claimed that this violated his rights under the Fourteenth Amendment.[11]

District Judge Huxman agreed that recent cases before the Supreme Court had shown some movement away from the Plessy doctrine, but basing his decision on Plessy v. Ferguson[12] and Gong Lum v. Rice[13] ruled:

> The statute and the maintenance thereunder of a segregated system of schools for the first six grades do not violate the constitutional guarantee of due process of law in the absence of discrimination in the maintenance of segregated schools.[14]

It was this decision which was eventually appealed to the Supreme Court of the United States and decided on May 17, 1954. The appeal was based on the claim that the segregation of the races in public schools under permissive or mandatory state laws deprived the plaintiffs of equal protection of the laws under the Fourteenth Amendment. The court referred to the intangible considerations that had been prominent in the Sweatt and McLaurin cases and said:

> Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.
>
> We conclude that in the field of public education the doctrine of "separate but equal" has no place....we hold that the plaintiffs are.... deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[15]

In the companion case of Bolling v. Sharpe[16] involving segregation in the public schools of the District of Columbia, a denial of due process of law under the Fifth Amendment was claimed. In finding for the plaintiffs, the court stated:

> In view of this Court's decision in Brown v. Board of Education that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal government.[17]

Once the Supreme Court had made its decision, it became the duty of the lower courts to interpret and implement the decision as cases were brought. It became obvious that there were several areas needing attention:

1. The specific details of the decision had to be developed.
2. The lower courts would have to interpret the "deliberate speed" statement.
3. The lower courts would have to examine motives and backgrounds in order not to permit the decision to be defeated by a variety of subterfuges.
4. Appellate courts would be placed in the position of judging the effectiveness of compliance ordered by lower courts.

Soon after the Brown decisions, a federal court for Arkansas considered the problem of reasonable implementation of the Supreme Court decision, when it held that all problems relating to administration or arising from physical conditions of the school plant, transportation system, personnel, and attendance areas should be considered by the court in determining the adequacy of a desegregation plan.[18] In another early case, the court said that it was the school's duty to put the Supreme Court decision into effect and to solve any problems arising from this process. In determining that a desegregation plan starting in 1954 and promising complete integration by 1963 was adequate, the court said that school authorities must exercise:

> . . .good faith and must consider the personal rights of all qualified persons to be admitted to free public schools as soon as practicable on a non-discriminatory basis, and the public interest must be considered along with all the facts and conditions prevalent in the school district.[19]

Not all courts were anxious to follow the Brown decision. The Florida Supreme Court, for example, denied a prayer for a writ of mandamus to compel the University of Florida Law School to admit a Negro "pending the determination of whether time was necessary to make adjustments and changes in the university before admitting Negro students."[20] A federal court held that persons attacking school statutes as being unconstitutional attempts to avoid desegregation must exhaust administrative remedies, but such remedies had to be adequate.[21]

Many attempts have been made to block or subvert the Brown decree. In a Louisiana case a federal court found that the administrative remedy of dissatisfaction with the superintendent's school assignment of a child under the state assignment statute was inadequate as a part of an invalid legislative plan for maintaining a dual school system.[22] The use of geographic zoning of schools as a device to prevent desegregation was struck down in an Ohio case in the federal courts. The court said:

> Where established by the Board of Education for the first time in a city of a zoning system with a gerrymandered districts set up in two separate parts, designed to embrace the entire school population of the city, brought about as a subterfuge to segregate Negro children who had been admitted to schools where only white children had been admitted before, such zoning is in violation of the decision of the Supreme Court of the United States.[23]

Some schools sought to escape desegregation by asserting the overcrowding of school facilities. In Willis v. Walker the court ordered school authorities to admit Negro pupils to county schools by February of the next year. The court agreed that overcrowding of existing facilities are conditions to be taken into consideration, but also stated that it was no defense for unlimited delay. The court also said:

> There must be compliance with the Supreme Court's mandate for racial integration in the schools at the earliest possible date, and good faith of school officials alone is not a test.[24]

The United States Supreme Court itself confronted in Cooper v. Aaron the question of delaying compliance with the Brown decision pending further challenges and efforts to nullify the court's holding that enforced racial segregation in the public schools of a state was unconstitutional denial of equal protection of the laws. The Supreme Court held that the local district court, after analysis of relevant factors and extenuating circumstances, shall require a prompt and reasonable start toward desegregation of public schools; and "to take such action as was necessary to bring about the end of racial segregation with all deliberate speed." With regard to local popular hostility to racial desegregation as a justification for delay, the Court said:

> The time has not yet come in the United States when an order of a Federal Court must be whittled away, watered down, or shamefully withdrawn in the face of violence and unlawful acts of individual citizens in opposition thereto.[25]

A major question that faced the local Federal Courts in carrying out the school integration mandate was the determination of "good faith" plans. A United States Court of Appeals decreed that although the federal district judge should not take the formulation of a desegregation plan out of the hands of school authorities, he had a responsibility to determine not only if a plan is offered in good faith but if it is reasonable in all its aspects.[26] In 1959 in harmony with this decision, the district court in Evans v. Buchanan found that the Supreme Court decision did not require total desegregation immediately but allowed a more gradual transition if circumstances required. The court included among these circumstances problems with buildings, teacher personnel, transportation, finances, varying educational achievement, and the impact of integration on a predominantly Southern society. On this basis, the court approved a desegregation plan providing for desegregation on a grade-by-grade basis over a period of twelve years beginning with the fall of 1959.[27]

As the process of school desegregation continued into the early 1960's, many states remained reluctant to yield to the court's mandate. One of these was the state of Louisiana, in which interposition statutes were enacted. In United States v. State of Louisiana the Supreme Court found invalid the statutes which asserted that the decisions in school segregation cases were a usurpation of state power, and interposed state sovereignty between the courts and the schools. The court stated: "The conclusion is clear that interposition is not a constitutional doctrine. If taken seriously, it is illegal defiance of constitutional authority."[28] Another problem was confronted in the Boson case in which a plan of desegregation provided for local option elections as to the continuance or abolition of a dual school system. The court struck down the plan in declaring that the enforcement of constitutional rights could not be made contingent upon the result of any election.[29] In the New Rochelle case, the court decreed that the plan for desegregation could not contain provisions requiring recommendations of classroom teachers and principals as to ability to perform in an academically satisfactory fashion before pupils could receive permission to transfer.[30]

With the passage of time, the courts increasingly began to press for greater speed in the desegregation of public schools. The appellate court in Wheeler v. Durham stated that Federal district courts, before approving desegregation plans, should require an immediate start toward the termination of discriminatory practices with all deliberate speed in accordance with a specified time table.[31] In another case, the Fifth Circuit Court of Appeals was disposed to limit the lower courts' discretionary powers by decreeing that the amount of time available for transition from segregated to desegregated schools becomes more sharply limited with the passage of years since the first and second Brown decisions.[32]

As we approached the mid-point of the decade of the 60's, the courts continued to exert increasing pressure toward school desegregation. Attendance areas, which in some earlier cases had been approved, were now struck down. This was true in the Manhasset case in which the court held that a small attendance area including 100 per cent of the Negro population of the district and less than one per cent of the whites, coupled with a rigid no-transfer policy, constituted a state-imposed segregation system.[33] Similarly, a free option plan in another case was struck down. This involved a plan under which a pupil whose race was in a minority in a given school could not be required to attend that school, but that he was to be permitted to transfer to a school in which his race predominated.[34] In a Florida case, Board of Public Instruction of Duval County v. Braxton,[35] the court undertook to outlaw the assignment of teachers on a racial basis, and even went further by ordering that"...defendants shall...set a target date by when Negro teachers in each school in the system should approximate the percentage of Negro teachers in the entire system." An example of Appellate Court irritation at the lack of progress in local school integration was seen in Hall v. West[36] in which the court declared that the time had run out for the District Court to temporize in order to arrive at a solution that may satisfy a school board which had ignored its duty to make a prompt start toward desegregation. The court said: "Where neither the school authority nor the district court has accepted its responsibility, it falls to the lot of the Court of Appeals to direct the district court to fashion a plan."

schools.[77] However, a petition challenging a board's adoption of a pupil assignment plan was dismissed for failure to exhaust remedies available at the local board level.[78] It did reach the level of the Commissioner of Education who dismissed the petition. He held that the plan for pupil assignment was reasonable rather than discriminatory. Some school patrons had attacked the idea as an unreasonable abuse of the local board's authority, saying the plan was motivated by expediency and bias and characterized by acts of favoritism and deceit. One court stated that it would examine any action of a public body which had the effect of depriving students of opportunity to obtain an education or that could defer a student's learning.

Courts have come to grips with the matter of ability grouping of students. Discrimination among students by separation into study groups of the accelerated and slower students was held to be reasonable and a proper exercise of board power.[79] A court supported a student assignment plan based upon intelligence level, achievement scores, or on other aptitude data.[80] Criteria for admission of students to the "academic curriculum" are useful and proper.[81]

In addition, conflict is revealed in examining cases about such matters as the validity of rules prohibiting students from attending purely social functions on nights immediately before a school day. There is conflict about how specific regulations may be regarding homework. It seems that almost any board rule which states that a student "must do a certain task between stipulated hours" falls outside the realm of reasonableness. All a board rule can really state legally is that students are expected to perform some school tasks at home.

It is clearly beyond local board authority for it to ask of the teachers that they assign themes on such topics as "Why Students Believe in. . ." or "Why Students Disblieve in Religious Devotions." The courts have interpreted the "neutrality" portion of the First Amendment as identifying the rule of the teacher as strictly that of one charged with the responsibility of maintaining proper order when religious exercises are conducted. No teacher is to be called upon by the board to select which prayer is to be said nor to choose any readings to be used. The students themselves must determine what should be done in such circumstances.

Significance of the Criterion

In many of the cases it is often not the reasonableness of any provision of laws which is the real issue but the reasonableness of other school regulations or the wisdom of personnel carrying out the provisions. According to testimony taken at some board hearings, the "reasonable grounds" premise actually means in practice sufficient justification for school authorities to believe the defendant student to be guilty of the alleged rule violation. Under even minimum cognizance of "due process" it must be the impartial court, acting as umpire, which decides which rule or prohibition is or is not reasonable. After exhausting administrative channels available to him, the student who believes he has a basis for complaint of violation of his rights by a governing board must seek relief from the courts. It is the courts—and the courts alone—which decide whether board rules are reasonable, are administered fairly, and are such so as to directly related to instruction.[82]

FOOTNOTES

1. Morris, L. Ernst, and Schwartz, Alan U., *Privacy -- The Right to Be Let Alone*. (New York: Macmillan Company, 1962), p. 1.

2. *Ibid.*, jacket flap.

3. Skinner, B. F., *The American Scholar*, (Vol. 25, Winter 1955-56), p. 54.

4. *McGrath v. Burkhard*, 131 Cal.App. 2d. 367, 280 P 2d 864 (1955).

5. Anderson, Lester, W.,and Van Dyke, Lauren A., *Secondary School Administration* (Boston: Houghton Mifflin Company, 1963, p. 226.

6. Seitz, Reynolds C., "The Law of Privileged Communications as It Affects the Work and Responsibility of the Principal," in *Law and the School Principal* (Cincinnati: W. H. Anderson Company, 1961), Chap.8, pps. 151-65.

7. *The People v. Russell*, 214 Cal.App. 2d 445, 29 Cal. Rptr. 562 (1963).

8. In Seitz, *Law and the School Principal*, *Op. Cit.*, pp. 151-52, is stated that the danger of school personnel incurring money damages or being held liable for uttering defamatory remarks is low. In many instances an employe or officer who shares defamatory unknowingly acts within the protection of a legal privilege.

   At other times his defamatory statements are merely the type of slander which causes no basis for the award of damages. Also, states the author, there is a very good chance that the parents involved will not go to court to file suit against the employe or officer.

9. From two cases more than a century ago comes the idea that a communication made bona fide upon any topic in which the communicating party has an interest—or in terms of which he has a duty—is privileged when made to a person having a corresponding interest or duty. This holds true even though the material contains defamatory matter, which without privilege—would be libelous. See *Harrison v. Bush*, 5 EL & B 344 (1855) and *Gasset v. Gilbert*, 6 Gray 94 (1856). 72 Mass. 94.

10. Black's Law Dictionary, 349.

11. Even if derogatory statements made by an employe about a student are false, it is probable that "privilege" will protect the utterer. He, of course, must seek to shield the interests of pupils, the school, and the reputation of the profession. If protection were withheld, accurate information (the truth) which should be shared would not be communicated due to fear of reprisal. A suit for defamation might ensue. There would be freedom from liability only by accepting the heavy burden of attempting to prove truth.

12. *Forsythe v. Durnham*, 270 N.Y. 141, 200 N.E. 674 (1936).

13. *Thompson v. Bridges*, 209 Ky. 710, 273 S.W. 529 (1925).

14. *Dawkin v. Billingsley*, 69 Okla. 259, 172 P. 69 (1918).

15. Cal. Educ. Code, Sec. 986. 10751. Also *Elder v. Anderson*, 205 Cal. App. 2d 326, 23 Cal. Rptr. 48 (1962).

5. Roberts v. City of Boston, 5 Cushion (Mass.) 198, 59 Mass. 198.
6. Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138.
7. Missouri ex rel Gaines v. Canada, 305 U.S. 337, 59 S. Ct. 232.
8. Sipuel v. Oklahoma Board of Regents, 332 U.S. 631.
9. McLaurin v. Oklahoma, 339 U.S. 637, 70 S. Ct. 851.
10. Sweatt v. Painter, 339 U.S. 629, 70 S. Ct. 848.
11. Brown v. Board of Education of Topeka, 98 F. Supp. 797.
12. Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138.
13. Gong Lum v. Rice, 275 U.S. 78, 48 S. Ct. 91.
14. Brown v. Board of Education of Topeka, 98 F. Supp. 797.
15. Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S. Ct. 686.
16. Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693.
17. Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693.
18. Matthews v. Launius, 134 F. Supp. 684.
19. Aaron v. Cooper, 143 F. Supp. 855.
20. State ex rel. Hawkins v. Board of Control, 83 So. 2d 20.
21. Atkins v. School Board of City of Newport News, 148 F. Supp. 430.
22. Bush v. Orleans Parish School Board, 138 F. Supp. 336.
23. Clemons v. Board of Education of Hillsboro, Ohio, 228 F. 2d 853.
24. Willis v. Walker, 136 F. Supp. 177.
25. Cooper v. Aaron, 78 S. Ct. 1401, 358 U.S. 1.
26. Board of Education of St. Mary's County v. Groves, 261 F. 2d 527.
27. Evans v. Buchanan, 172 F. Supp. 508.
28. United States v. State of Louisiana, 81 S. Ct. 260.
29. Boson v. Rippy, 285 F. 2d 43.
30. Taylor v. Board of Education of New Rochelle, 191 F. Supp. 181.
31. Wheeler v. Durham City Board of Education, 309 F. 2d 630.
32. Davis v. Board of School Commissioners of Mobile County, 364 F. 2d 896.

33. *Blocker v. Board of Education of Manhasset*, 226 F. Supp. 208.

34. *Rogers v. Paul*, 232 F. Supp. 833.

35. *Board of Public Instruction of Duval County v. Braxton*, 326 F. 2d 616.

36. *Hall v. West*, 335 F. 2d 481.

37. *Stell v. Savannah-Chatham County Board of Education*, 333 F. 2d 55.

38. *Fuller v. Volk*, 230 F. 25.

39. *Balaban v. Rubin*, 248 N.Y.S. 2d 574.

40. *Steinberg v. Donovan*, 257 N.Y.S. 2d 306.

41. *Pettaway v. County School Board of Sunry County*, 230 F. Supp. 480.

42. *Griffin v. Board of Supervisors of Prince Edward County*, 339 F. 2d 486.

43. *Singleton v. Jackson Municipal Separate School District*, 348 F.2d 729.

44. *Singleton v. Jackson Municipal Separate School District*, 355 F.2d 865.

45. *Wright v. County School Board of Greensville County, Virginia*, 252 F. Supp. 378.

46. *Turner v. County School Board of Goochland County, Virginia*, 252 F. Supp. 578.

47. *Davis v. Board of School Commissioners of Mobile County*, 318 F. 2d 63.

48. *United States v. Jefferson County Board of Education*, 372 F. 2d 836.

RACE RELATIONS AND THE SCHOOLS IN THE UNITED STATES:
LAW AND POLICY

By
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Dr. Stolee in his presentation has concentrated on the legal aspects of race relations in American schools, and it is my intention to deal primarily with the policy aspects. That is, to argue the inherent togetherness of the legal and policy aspects of most facets of our social system; to present a few of the trends and issues having to do with public and social policy relative to de jure and de facto school segregation; and, hopefully, at the same time to suggest a few viable models of institutional and community actions that might or are likely to be brought to bear on these issues, using both legal and extralegal leverages.

I am assuming, of course, that today's audience--composed as it is of highly responsible school officials, professors in education, school attorneys, and other miscellaneous dignitaries--has some unity of purpose in wishing to bring to an end the dual school system in the South and in wishing to see some reasonable solutions proposed to the most difficult problems of de facto segregation faced by the larger urban centers particularly of the North, but also increasingly in the South.

As intelligent American citizens and decent human beings, we undoubtedly sense that it is to our great economic, political, and moral advantage to make more than "deliberate" speed in the school desegregation process. It is no empty threat to suggest that unless such progress is made, and made rapidly, we are inviting disorderly rather than orderly, legal procedures and in many cases a violent and socially disrupting fragmentation of the American community itself.

The legal and policy aspects of race relations in schools are becoming more closely interrelated. It is becoming apparent that legal problems-- or for that matter, any administrative or policy problems--in education can not be profitably disassociated from contemporary social forces in the larger community. Although much of its worth lies in its stability, law is not a rigid, isolated entity but has a reasonably dynamic quality, often maintaining a balance between the forces of relativity and permanence in the society.

School administrators who have had the experience of teacher walkouts during recent periods of collective bargaining or professional negotiations are well-aware that the immediate, extralegal social aspects of these confrontations are as crucial as the legal ones. As one nearby Florida superintendent put it, "When the teachers are out for a walk, it isn't too important whether they're out legally or illegally; the fact is, they're out."

The excellent NBC television documentary of October 27 --"Justice for All" --concerning legal help for our country's poverty-stricken peoples presented very forcefully the proposition that such cherished ideals of our democracy as law, order, equal protection, and due process are rendered meaningless unless they encompass an operational concept of social justice--or I should say a reasonably current operational concept of social justice because we do live in a society of rapidly changing cultural and social values.

Narrator Edwin Newman ended the show with the statement that a solution (to the problem of legal aid to the poor) is essential "because in a country governed by laws all must have equal access to those laws."[1]

"It is also essential," continued Newman, "because it offers legal procedures as a substitute for demonstrations and riots. Most of all, it is essential because it is a matter of simple justice."[2] Thus, it would seem that the legal problem of a man's stealing a loaf of bread is made increasingly complicated by the social problem of his hunger.

The Brown decisions of 1954 and after[3] were every bit as much social documents as legal ones and in considerable part were based on research findings in the social sciences. The decision of the Fifth Circuit U. S. Court of Appeals in the Jefferson County case[4]; of Judge Simpson in the Braxton case[5] in Duval County, Florida; and of Judge Wright in the Hobson v. Hansen case[6] in Washington, D. C. were not only legal interpretations of the earlier Brown segregation decisions but admonitions to school authorities that Constitutional guarantees of due process and equal protection under the law may in fact compel them to take positive social action in eliminating racial imbalances in the schools or in providing remedial educational opportunities for students disadvantaged by past inequities of the dual school system, as well as ending the dual structure itself.

The trends and issues having to do with public and social policy relative to de jure and de facto school segregation can essentially be grouped under the same three general areas that are dealt with in the HEW guidelines: student assignment; faculty and staff employment and assignment; and school facilities and the educational program. Because of time, it will be feasible to discuss only a few of the most significant of these trends and issues.

In pupil assignment trends, in spite of the Jefferson County decision and the Supreme Court's refusal of October 9th to review the case, the integration of classrooms across the 17 southern states continues to move very slowly. While desegregation statistics are not yet available for the current school year, it is unlikely that as many as fifteen percent of the Negro children in the South will be enrolled in integrated schools in spite of the notable progress certain areas such as Louisiana are making. Atlanta, for example, reports 84 percent of all Negro children still in 59 all-Negro schools; 28 Atlanta schools are 100 percent white and an additional 39 are more than 90 percent white.[7]

Congressional sentiment--made evident during the past summer in debate on the Green Amendment to the Elementary and Secondary Education Act--seems to be leaning toward the use of national compliance measures to compensate for the alleged desegregation hardships imposed on the South. This is first made evident by the current racial survey being conducted on pupil and staff assignments in the larger districts of the North and West by the new HEW Office of Civil Rights under Peter Libassi. It is likely the compliance staff will review such practices as gerry-mandering of attendance zones, unequal educational facilities and opportunities for ghetto schools, and discrimination in the assignment of teaching staffs, including eventually supervisory and administrative personnel.[8]

It is a bit difficult to believe, however, that the federal government could soon exert any legal pressures against de facto segregation when currently court decisions are running at least 4 to 1 for the position that school boards have no affirmative constitutional duty to affect racial balance where housing patterns are otherwise.

Irrespective of what happens in the courts or in Washington, several northern communities are making responsible efforts to fight their de facto problems in a number of ways -- Hartford, Berkeley, San Francisco, Chicago, and Philadelphia among others.

There are several major issues related to the desegregation of students. First, the relative merits of open enrollment or free choice plans as compared to the establishment of racially balanced attendance zones. Our experience in the work of the Desegregation Center indicates that most free choice plans have become increasingly ineffective. In fact, many Negroes, at first enthusiastic about the possibilities of open enrollment, have sought academic and social security in a return to all-Negro schools where a choice is permitted. The more millitant Negroes are -- for one reason or another-- often in active, and in some cases, violent opposition to integrated facilities. At the same time, few whites volunteer to attend predominantly Negro schools.

Reasonable and prudent racial balance can be achieved in many areas where ghetto housing patterns do not lock out all possibilities for maneuvering. School officials have the opportunity to help stabilize residential communities by establishing pupil assignment ratios by race for all schools in the area similar to the area's general population balance. Such balancing does not have to be over an entire metropolitan area but can cover regional zones.

To give an example, if a white family living in one area of South Dade County finds its nearest school desegregated with an influx of 20 percent Negroes, they will not find it particularly advantageous to move to another section of South Dade County to avoid this if all schools in the South Dade area have approximately the same racial balance. And in the case of secondary schools, such a balance might be worked out without a prohibitive amount of bussing.

A second issue in pupil desegregation is the validity of the neighborhood school concept and its concomitant administrative policy of "no bussing" to achieve racial balance. In spite of the impressive arguments for the neighborhood school idea and its seeming legal impregnability, there are a few straws in the wind which may indicate some changes.

At the AASA convention in Atlantic City last winter (February, 1967) several prominent speakers, generally not professional educators, questioned the appropriateness of neighborhood schools in light of some of our recent difficult urban social problems. Dr. Conant, probably the most influential spokesman on American education today, was recently quoted as urging "a massive reorganization of attendance zones to help American high school students become true instruments of Saturday democracy, both academically and socially."9

Judge Wright's decision in Hobson v. Hansen,[10] of course, "declared de facto segregation unconstitutional, and ability grouping, as practiced in the public schools of Washington, D. C., a fatal deterrent to the educational development of Negro children."[11]

One of two quotes might be given from decisions favoring board action to alleviate racial imbalance. The first, from Blocker v. Board of Education:[12]

> While it is true that other federal courts have arrived at the conclusion that school boards are not required to take affirmative action to end racial imbalance, this doctrine seems to be in a state of diminishing force, if not outright erosion.

And from Barksdale v. Springfield School Committee:[13]

> Racially imbalanced schools impair the quality of educational opportunity guaranteed to Negro children by the Fourteenth Amendment... The Neighborhood school plan of school attendance, while not unconstitutional per se, must be abandoned or modified when it results in segregation in fact.

The most energetic pressures to end de facto segregation will probably emerge from: (1) continued behavioral science research studies such as the Coleman report[14] which indicate the necessity of integrated schools for quality education; (2) litigation of every variety designed to provide equality of education for Negroes in the metropolitan areas; and (3) the raw forces that can be brought to bear by both legitimate community groups and more radically inspired black power groups whose violent tactics often seem to bring results. Kipling once wrote:

> It is not learning, grace nor gear,
> Nor easy meat nor drink,
> But bitter pinch of pain or fear
> That makes creation think.

A third issue in pupil desegregation is the threat to academic standards that integration poses to white schools in the South or suburban schools in the North. While it is probably true that the median achievement scores for a school being integrated will drop, there is no indication that the median scores for the white incumbents will drop or the scores for the incoming Negroes. On the contrary, there is considerable evidence that both groups are likely to improve over previous records.

There are several major issues involved in faculty and staff employment and assignment. First, should staff assignment to schools where the majority are of the opposite race be voluntary or involuntary? Legally, there is no problem here but many administrators feel that staff morale is impaired if these assignments are involuntary. The same problem is found in the North in coercive assignments to inner city schools. Faculty desegregation in the South is being given strong emphasis by the HEW compliance section.

A second major issue in this area is the adequacy of teacher preparation programs in respect to employment in integrated schools or inner city schools. One is quite safe in asserting that the preservice preparation of teachers in this regard is woefully inadequate.

The fate of Negro administrators is a third issue in staff employment and assignment. As Negro schools in the South are phased out, many Negro principals are also being phased out of authority positions. The South is not yet ready to assign Negro principals to positions as heads of desegregated schools but the day is coming. Training programs must be implemented by universities and school systems which will take promising young Negroes where they are and prepare them for positions of leadership which will eventually be open to them.

Schools of education must face up to the tremendous task of preparing young teachers to work in multi-cultural schools and inner city schools or they are going to be bypassed in the preparation process. And professional organizations of teachers must exert some leadership in the desegregation of faculties because school boards need help in this process.

These are numerous questions to be answered in the area of school facilities and educational programs. First, what is the proper level of expenditures for desegregated schools in the South and ghetto schools in the North? The Wright decision makes it clear that the Constitution mandates equality in the allocation of educational resources -- an equality that we thought was achieved under the separate but equal doctrine but which was only a myth.

Second, is there validity in the educational park concept in terms of both cost and quality?

Third, what is the proper approach to the education of Negroes? There are perhaps three lines of thinking here. First, the Booker T. Washington idea of self-improvement linked with accomodation and submission. This is losing ground with many educators. Second, the acculturation of the minority group. Unfortunately, this panacea doesn't come to grips with the Negroes' hatred of the "man" and of himself, and it leaves white prejudices completely untouched.

Perhaps the best approach is the education of Negroes for the acquisition of power -- political, social, and economic power. Only through the gaining of an adequate self-concept can the Negro personality and identity be restored to its rightful status. Unfortunately, this approach is the most threatening to the majority group and for that reason the least likely to be followed.

The recurrent question of whether segregated schools can truly give equal educational opportunity to their clients remains debatable. Even if they cannot, it is clear that the opportunity can be a lot more equal than it has in the past.

In summary, there are many difficult issues involved in school segregation some of which are probably insoluble over a limited period of time. In spite of this, there is evidence that where intelligent school officials of good will and responsible community groups work together toward reasonable goals some progress can be made. In the final analysis, the arrival of the integrated educational establishment will probably be an act of faith.

FOOTNOTES

1. As quoted in Laurence Laurent's "Radio and Television" column in The Washington Post, October 18, 1967.
2. As quoted in Laurence Laurent's "Radio and Television" column in The Washington Post, October 28, 1967.
3. Brown v. Board of Education of Topeka, 347 US 483; and 349 US 294.
4. U. S. et al v. Jefferson County Board of Education et al, 372 F.2d 836.
5. Braxton v. Board of Public Instruction of Duval County, Florida, 326 F. 2d 616.
6. Hobson v. Hansen, 256 F. Supp. 18; and 265 F. Supp. 902.
7. As reported in The Christian Science Monitor, October 10, 1967, p. 3.
8. See Phi Delta Kappa, XLIX (November, 1967), p. 164.
9. As quoted in a speech at Los Altos, California, The Christian Science Monitor, October 8, 1967.
10. Hobson v. Hansen, 256 F. Supp. 18; and 265 F. Supp. 902.
11. Robert L. Carter, "School Integration is Still on the Agenda," Saturday Review, L (October 21, 1967), p. 70.
12. Blocker v. Board of Education of Mahasset, E.D. N.Y. 1964, 226 F. Supp. 208, 229 F. Supp. 709.
13. Barksdale v. Springfield School Committee, D. Mass. 1965, 237 F. Supp. 543.
14. James S. Coleman et al, Equality of Educational Opportunity, U. S. Department of Health, Education, and Welfare, Washington, D. C. 1966.

MEDIATION, FACT FINDING, ARBITRATION

By

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I have been asked to deal with those developments in the field of collective negotiations which have to do with resolving the impasse if one arises.

This, of course, means that I am to discuss:

1. Mediation
2. Fact Finding
3. Arbitration

Mediation involves calling a competent person in who will attempt to bring the parties together. When he is called upon he will make himself familiar with the demands and the position of each party. He will sometimes meet with each party separately. At other times he will call the parties together. Without violating confidences he will advise the parties as to what he thinks will produce a settlement. He will untimately make his recommendations to the parties. His recommendations are not binding.

Most of the statutes that are being passed in support of collective negotiations invite but do not require the parties to try mediation if an impasse arises. If voluntary bargaining is conducted the parties can agree to try mediation.

If the impasse remains after mediation or if mediation is not tried the statutes supporting collective negotiations require the parties to submit the matter to fact finding. The statute usually prescribes the method of appointing a fact finder. In Wisconsin, for example, the fact finder or the fact finding board is appointed by the Wisconsin Employment Relations Commission.

Under the various statutes the fact finder conducts hearings and ultimately issues recommendations. These recommendations are not binding on the parties. It is the hope that the recommendations will enlist the support of the public and make it difficult for the parties not to comply. In Wisconsin a remarkably high proportion of the fact finder's recommendations have been adopted.

A most interesting aspect of fact finding is the extent of the power of a fact finder. A fact finder is not necessarily confined to a recommendation based solely upon what the parties discussed at the bargaining table. He can take judicial notice of certain matters which empower him to call for additional evidence. This I did in a recent case I heard in Milwaukee - the longest and most complicated yet heard by a single fact finder under our Wisconsin statute. I refer to an impasse between the Milwaukee Police Association and the City of Milwaukee. One of about 25 different issues was, of course, the question of salary. I held that in connection with such issue I wanted evidence on the status of police education and training. I explained that it might be that I would feel a raise justified, but I might also feel that some additional in-service education was necessary. The City objected violently on the ground that education had not been discussed at the bargaining table. I stuck to my position. The evidence came in and the City ultimately recognized that the public, the newspapers and the WERC was with me. (Incidentally my recommendations were followed almost 100%.)

The task of a fact finder cannot be so narrowly construed as to prevent an effective solution to the impasse that called his service into being. By implication a fact finder has power to take evidence and offer solutions under the yardstick of what is reasonably pertinent.

Since in a sense the fact finder actually represents the public I feel that oftentimes he must ask for evidence on matters which may not have been discussed at the bargaining table. I felt actually obligated to take judicial notice of the wealth of discussion by the most prominent of authorities on the relationship between police education and the kind of force desired. I felt that salary alone would not produce that force. I, therefore, ordered the evidence to come in and finally made certain suggestions for improvement.

A fact finder does not, of course, have implied power to ask for anything that comes into his head. For example, assuming that pensions were not an issue in the Police case (they actually were), could I have required evidence on pensions if there had been no bargaining about the matter. I submit I could not unless enough authorities had written about the need for better pensions in order to upgrade police. If that had been the fact I could have taken judicial notice of it and should in the interest of the public require the evidence.

Another important power of a fact finder is to make his recommendations retroactive. Fact finders in Wisconsin have done this. The argument of a municipality against such power is that unions will be induced to go too frequently to fact finding. But if the power were denied the union would be under the gun to accept a last offer or tempted strongly to strike. And it should be remembered that fact finding is designed to deter against strikes.

Finally, I want to talk about arbitration as a method of resolving an impasse. To date there is no provision in any statute that I know of to call in an arbitrator to write binding contractual terms. There has been some talk that such provisions ought to be written into law. If they were I feel certain many courts would not sustain on the ground of an invasion of school board authority.

But there is a type of arbitration clause which I have argued for years is legal. It is perfectly proper for the parties to agree to call in an arbitrator to render a binding decision if a dispute arises under the terms of a contract that has been negotiated. This is an effort to settle a type of impasse. If an arbitrator is not used in such a case the dispute can only be settled by court action or strike pressure. It is perfectly proper for the parties to agree that arbitration is preferable.

Two 1967 cases that have upheld such arbitration clauses in contracts in the public employment field are Local 1227 v. City of Rhinelander, 151 N.W. 2d 30 (Sup.Ct.Wis.) and Local 953 v. School District, 66 LRRM 2419 (Mich. Circuit Court).

In closing I will merely say that the techniques I have described are calculated to deter strikes and I am confident they will often do so. However, there is no absolute assurance they will. But others are to discuss the matter of dealing with a strike if it is called.

The following memorandum was discussed by
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MEMORANDUM OUTLINING THE PROVISIONS OF THE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

The following is a summary of the significant provisions of the Public Employees' Fair Employment Act as they affect professional employees of a board of education. The Act becomes effective September 1, 1967. It should be understood that in some respects the Act is less than perfectly clear and the following is based on a reading of a statute yet to be officially interpreted. Since the Act follows in almost all respects the recommendations of the Taylor Committee, that Committee's full report is essential for anyone trying to understand the statute and is recommended reading.

A. The Rights Guaranteed Teachers

The basic rights accorded teachers under the statute are twofold. First, their "right to form, join and participate in, or to refrain from forming, joining or participating in, any employee organization of their own choosing" is guaranteed (Section 202).

Second, they are given the right to be represented by teacher organizations for the purpose of "negotiating collectively in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder" (Section 203).

B. Certification and Recognition of Public Employee Organizations

Pursuant to the recommendations of the Taylor Committee, the Act permits some degree of local autonomy with respect to procedures for according recognition to teacher organization. The statute in effect provides that procedures for according recognition adopted by a board of education through local law, ordinance or resolution will be controlling so long as such procedures have been submitted to the Public Employment Relations Board (PERB) and the PERB has determined that they are substantially equivalent to the provisions and procedures set forth in the Act with respect to state employees (Section 212).[1]

The limitations placed on the local boards as a result of the requirement of substantial equivalency with procedures for state employees are at least as follows:[2]

1. The procedures probably must be determined after consultation with interested teacher organizations (§ 206).

However, the obligation to consult does not appear to require that the local board of education reach agreement with interested teacher organizations but only that such organizations be consulted.

2. The definition of the appropriate unit must correspond to "a community of interest among the employees to be included in the unit" (Section 207 (1)(a)). Although the statute provides several others standards for determining appropriateness of the unit, it would seem that the only one of significance with respect to teachers is the requirement of a community of interest. The Act neither requires nor precludes inclusion of supervisory personnel in the negotiating unit. In fact, the Taylor Committee Report specifically refers to teachers as a possible group as to which inclusion of supervisory personnel might be appropriate.

3. The teacher organization must affirm that it does not assert the right to strike (Section 207 (3)(b)).

In certain other significant respects, the local board of education would not appear to be under any such mandate. The most important of these are:

1. The matter of exclusive representation. The Taylor Committee specifically decided not to make any recommendation with respect to the question of whether there should be exclusive representation in public employment. Instead it left this matter, for the time being at least, for further study by the PERB and for decision at the local level. It is, however, clear from the Taylor Committee Report that exclusive representation is permissible and the Report contains a useful discussion of the arguments in favor of exclusive representation. It would appear that the reasons given by the Taylor Committee for not recommending exclusive representation at this time related to certain unit problems which may exist in some areas of public employment but which would not appear to be applicable to teachers. Local teacher groups are in a good position to argue that it is clear that had the Committee been dealing with a statute strictly for teachers, it would have recommended that there be exclusive representation.

2. How representation status is to be determined. The Act merely provides that a board of education is authorized to ascertain the teachers' choice of organization as their representative "on the basis of dues deduction authorization and other evidences, or, if necessary, by conducting an election" (Section 207(2)). Thus, if a board of education so decides, it may accord recognition strictly on the basis of evidence of membership in an organization without the holding of an election.

C. Rights Accompanying Certification or Recognition.

Irrespective of whether recognition is accorded pursuant to local procedures or, in the absence thereof, an organization is certified pursuant to procedures established by the PERB, the Act guarantees that organizations recognized or certified pursuant to the Act shall have the following rights:

1. To represent teachers in negotiations and in the settlement of grievances (Section 208(a));

2. To membership dues deduction, upon presentation of dues deduction authorization cards signed by individual teachers (Section 208(b)); and

3. To unchallenged representation status for the following period: Assuming recognition is accorded sometime prior to the budget submission date in 1968, unchallenged status would automatically run until 120 days prior to the budget submission date in 1969 or, if the parties so agree, for a further period, but no longer than 120 days prior to the budget submission date in 1970 (Section 208(c)). The "budget submission date" is defined as July 1 in the case of city school districts and the date of the "annual meeting" in the case of other school districts (Section 201(2). It is not certain at this time what effect will be given to recognition accorded prior to September 1, 1967, and it would appear advisable that any group recognized prior to that date secure a reaffirmation of recognition some time subsequent to September 1.[3]

D. The Scope of Negotiations

The statute provides that public employees shall have the right to be represented for negotiations with respect to "terms and conditions of employment." This term is defined in the statute as meaning "salaries, wages, hours and other terms and conditions of employment" (Section 201(5)).

It is impossible to delineate precisely the areas of concern to teachers which will be held to come within this definition. However, based on experience in states with similarly vague definitions of the scope of negotiations, it is our opinion that the definition at least includes the following: salaries, grievance procedures and arbitration, the teaching year, teaching hours, teaching load, class size, the use of aides to relieve teachers from non-teaching duties, assignments, transfers, promotions, teacher evaluations, teaching facilities, the use of school facilities by teacher associations, salary and conditions of work in summer and evening school and on federal projects, leaves of absence, insurance, protection of teachers, and administrative internship programs. A useful piece of evidence for the purpose of persuading a board of education that certain matters are negotiable has recently been provided by The American Association of School Administrators. The AASA, in a document entitled "School Administrators View Professional Negotiation" has taken the following position on the appropriate scope of professional negotiations:

> "The AASA believes negotiation, in good faith, may well encompass all or some aspects of policy governing such items as --
>
> 1. Curriculum
> 2. Inservice education
> 3. Personnel policies
> 4. Teaching assignments
> 5. Transfers and promotions
> 6. Recruitment of teachers
> 7. Discharge and discipline of teachers
> 8. Provision of physical facilities for teachers
> 9. Grievance procedures
> 10. Recognition of the negotiating team

11. Lunch and rest periods
12. Salaries and wages
13. Welfare benefits
14. Class size
15. Leaves of absence
16. Expiration date of negotiation agreement
17. Other mutually agreed-upon matters which directly affect the quality of the educational program."

Many areas of teacher concern, such as curriculum and textbooks, involve matters that are usually not best handled in once-a-year negotiations dealing with fiscal matters. Negotiating sessions of this character are hardly the appropriate time for discussing whether a particular textbook should or should not be used. However, it is appropriate to negotiate procedures for teacher involvment -- on a year round basis -- in the decision-making process on such subjects. An example of this approach is a provision of the agreement in Quincy, Mass. establishing a permanent committee to "consider all proposals from any source respecting curriculum, teaching methods, aids and materials, educational facilities, design and equipment of new and remodeled school construction and any other matter pertaining to the improvement of the educational programs carried on or proposed to be carried on in the Quincy public schools."

E. Impasse Procedures.

As in the case of recognition procedures, the Act provides for possible local initiative on impasse procedures. However, in contrast to the provisions with respect to recognition, agreement with the recognized teacher organization may very well be a prerequisite to those procedures being controlling (Section 209(2)).

The most important feature of an adequate impasse machinery is provision for utilization of the services of impartial third parties for mediation and/or fact finding. Selection of impartial third persons can be made in a number of ways: agreement by the parties on an ad hoc basis when the impasse develops, appointment by an outside agency such as PERB, or initial agreement by the parties on a panel of named persons from which one or several will be chosen in the event of an impasse.

It may also be desirable to provide in the impasse procedure that any initial recommendations by a fact finder be designed to provide a framework for settlement without attempting to prescribe the total and exact terms of agreement. Such recommendations would first be made privately to the parties, the fact finder retaining jurisdiction for a specified period of time during which the parties would try to negotiate an agreement. Failing total agreement, they would return to the fact finder for recommendations of a more specific nature covering the matters still in dispute. If the parties were still unable to reach agreement, these recommendations would be made public. If local impasse machinery providing for fact finding has been established and an impasse exists after recommendations for settlement have been made by a fact finder, the Act provides that the PERB shall have the power to take whatever steps it deems appropriate, including the making of its own recommendations after giving consideration to the findings of fact and recommendations of the parties or fact finding board, but it is not authorized to appoint another fact finding board (§ 209(3)(d)). In the event that the impasse still exists thereafter, both the superintendent of schools and the employee organization are each required, within five days of receipt of the above recommendation, to submit to the board of education its recommendation for settlement.

In the absence of locally agreed-upon impasse procedures, the Act provides for the following steps:

1. An impasse is determined to exist if the parties fail to reach agreement at least 60 days prior to the budget submission date of the public employer;

2. On request of either party or upon the PERB's motion, the PERB shall appoint mediators to assist the parties to effect voluntary resolution of the dispute;

3. If an impasse continues, the PERB shall appoint a fact-finding board of no more than three members, such board to have the power to make public recommendations for the resolution of the dispute;

4. If the dispute is not resolved at least 15 days prior to the budget submission date, the fact-finding board is required to submit its findings to the superintendent of schools and to the teacher organization involved and to make public its findings and recommendations; and

5. In the event the recommendations are not accepted in whole or in part by either the board of education or the teacher organization, the superintendent of schools and the teacher organization are each required, within 5 days of receipt of the report, to submit to the board of education recommendations for settling the dispute.

Although this memorandum will not review in detail the provisions of the statute dealing with penalties for engaging in strikes, it should be noted that the conduct of a teacher organization and a board of education, both before and after a strike, if one occurs, is of great significance with respect to possible penalties. The Act provides that the PERB, in determining whether an organization has violated the no-strike provisions of the Act (for the purpose of determining whether the organization shall lose the right to dues deduction) is required to take into account "(i) whether the employee organization called the strike or tried to prevent it, (ii) whether the employee organization made or was making good faith efforts to terminate the strike, and (iii) whether, if so alleged by the employee organization, the public employer or its representatives engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike" (Section 210(3)(e). In addition, it is arguable that these same conditions must be considered by a court in determining whether or not to enjoin a strike (Section 211). Finally, a court in fixing a fine for contempt must consider, among other things, "the impact of the strike on the public health, safety, or welfare of the community" and may consider whether the public employer "engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike" (Subdivision 2(a) of Section 751 of the Judiciary Law).

FOOTNOTES

1. Recourse to the PERB for resolution of a dispute concerning representation is available only if such local procedures do not exist (Section 205(5) (c).

2. The words "at least" are used because it is not entirely clear from the statute whether consistency with procedures which may subsequently be adopted by the PERB for application to state employees is also required.

3. The Act also does not make clear whether there is a similar period during which no challenge can be made if representation status is not challenged at the end of the above period.

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THE NEGOTIATING COUNCIL IN CALIFORNIA AN INNOVATION IN TEACHER-SCHOOL BOARD RELATIONS

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THE BERKELEY CASE

The California Court of Appeal for the First Appellate District, in deciding questions of first impression regarding California's 1965 Winton Act, recently said:

> "Thus, the conclusion is inescapable that the Legislature intended to bar representational elections from the field of public school employment and expressly rejected the collective bargaining approach of having a single employee organization represent all certificated employees."

In a footnote to this statement the court added:

"This rejection has been recognized as a novel innovation in the field of public employment (Section of Labor Relations, Committee on Law of Government Employee Relations, ABA. 1966 Proceedings, p. 151)." (Berkeley Teachers Association v. Berkeley Federation of Teachers (9/25/67) 254 Advance California Appellate Reports (A.C.A.) 708, 720).

Plaintiffs and respondents, the Berkeley Teachers Association and its officers, individually and in their representative capacities, initiated this action for declaratory and other relief against the Members of the Berkeley Board of Education and the Superintendent of Schools of the Berkeley Unified School District. The interveners and appellants are the Berkeley Federation of Teachers and its President.

The consolidated appeals involved in this case are from an order granting a preliminary injunction and a judgment permanently enjoining the Berkeley Board of Education from holding an election among its certificated teachers and other certificated employees to determine organizational representation on a nine-member "Negotiating Council" created by that Board of Education pursuant to the Winton Act.

The Appellate Court affirmed the judgment permanently enjoining the Berkeley Board of Education from holding this election among its certificated employees.

The plaintiff Berkeley Teachers Association and the intervener Berkeley Federation of Teachers are each voluntary unincorporated associations composed of the District's certificated employees. Each organization meets the statutory definition of an employee organization. (Ed. Code § 13081, subd. (a)). The District meets the statutory definition of a public school employer. (Ed. Code § 13081, Subd. (b)).

> "Where the unauthorized copying displaces what realistically might have been a sale, no matter how minor the amount of money involved, the interests of the copyright owner need protection."

The language "no matter how minor the amount of money involved" flies in the face of the combined consideration of all four criteria and prevents dealing with all four criteria in conjunction with each other. It seems to be a categorical assertion which, in effect, wipes out the other three criteria. At the very least, it creates such uncertainty as to endanger the meaningfulness of the entire section as it was intended to authorize limited copying and recording for educational purposes.

As I have stated, while fair use (and its legislative history in the House Report) is not what we really want, we shall live by our agreement to accept it—provided it is the agreement we made. And we did not make any agreement which includes the language "no matter how minor the amount involved."

In still another aspect, the Report of the House Committee on fair use is unsatisfactory and unwise. This arises out of the language in the House Report (p.36) discriminatorily restricting fair use by educational broadcasts. Both classroom and broadcast teachers should have the same right of fair use under the copyright law. We reject any unjustified unfairness to educational broadcasters.

II. THE NEED FOR REASONABLE USE OF NEW EDUCATIONAL TECHNOLOGIES

There are many aspects of new technology in which the current bills relegate education to the horse and buggy era instead of admitting it into the jet age. I shall mention three in particular"

(a) The problem is illustrated, first by the highly unsatisfactory provisions of Section 110(2)(D) of the House-passed bill which denies copyright uses where the work is on a student-activated transmission from a computer or other storage and retrieval system. What is here involved is dial access programs, computer-assisted instruction, and similar new educational technologies. This section virtually bars individualized uses of the newer educational classroom technology whose purpose is to encourage independent learning activities. This provision is highly deleterious to effective teaching as we now know it, and should be completely deleted.

Take for example the foreign language laboratory--and I use this merely to illustrate this type of problem. Schools buy tape-recorded speech patterns for students to imitate. When the tape is used on a machine in the room where the student is located (so that transmission is unnecessary), §110(2)(D) does not apply. Where the tape is used by means of a machine which transmits the sounds at a teacher's activation, §110(2)(D) does not apply. But where the identical tape is used in the identical machine, but is activated by a student, even if he is in the same room with the teacher, this would be forbidden by §110(2)(D). Or if the student was ill and absent, and tries to make up the lesson later on the very same system, it is barred. Please bear in mind that we are not here necessarily talking of copies--we are using mostly tape we bought and paid for, and for the very purpose for which it was purchased, e.g., to be heard by the student in order that he might learn by imitating the purchased tape.

In the language laboratory we use the very copy we bought for the only purpose for which it was bought. There is an internal inconsistency in the bill: if a teacher pushes the button, so to speak, the use of copyrighted material on such a transmission is permissible; if a student does, it is impermissible.

Education is increasingly moving in the direction of indivualized learning. It is becoming less and less teacher-oriented and more and more student-oriented. The trend is for the student to take greater responsibility for his learning through self-directed learning activities instead of formal teaching activities. Section 110(2)(D) is a body-blow to all this.

(b) As part of this same teaching problem, I must refer to a provision of S.597, one which fails to distinguish between closed circuit or point-to-point instructional broadcasting, on the one hand, and open channel broadcasting, on the other. This is based upon an error of fact. Closed circuit transmissions consist of limited, controlled, and non-public systems within the schools; they are controlled or closed transmissions not available to the public. It is unrealistic and unreasonable to treat them just like open channel broadcasts which can be picked up by anyone who tunes in.

Consequently, we believe that closed circuit or controlled transmissions should be under a new provision which we have proposed to the Congress.

(c) And thirdly, in this area of new technology, there is the whole gamut of problems related to the educational use of computers. I shall not expatiate on them. Our main objective at this early stage in their use is the insistance that

(i) input into the computer should not be infringement, and

(ii) such questions as the applicability of "fair use" should arise only at the output stage.

This is a highly controversial and unsettled area, and the Senate passed S.2216, to create a National Commission on New Technological Uses of Copyrighted Works, to consider this problem and also machine reproduction, and their impact on copyright law.

III. THE NEED FOR REASONABLE ACCESS TO COPYRIGHTED MATERIALS

While the problem of educational access to copyrighted materials is a broad and underlying one, at this point I shall refer only to duration of copyright.

Since our first copyright law in 1790, a renewable term has been the characteristic hallmark of American copyright law. The present law provides for an initial period of 28 years copyright, renewable for a similar period of 28 years after which the work goes into the public domain. Failure to renew puts the work in the public domain after 28 years.

Current bills would work radical surgery on this tested and unique American policy by adopting a copyright period measured by the life of the author plus 50 years.

The Ad Hoc Committee urges retention of the present renewal provision of law: a 28-year initial term of copyright plus a 28-year renewal period. As an alternative, we favor the Register's proposal in his 1961 Report: initial 28-year term plus a 48-year renewal term, totaling 76 years (instead of the present 56).

An official Copyright Office study shows that "less than 15% of all registered copyrights are being renewed at the present time." Therefore, the life-plus-50 rule of the new bill would deprive education, in some instances for 100 years, of the present right to use 85% of all registered copyrights after 28 years.

council. Then, section 13085 provides that the members of the negotiating council are to be appointed, according to the proportionate allotment, by the organizations representing certificated employees. The formula for determining membership on the negotiating council does not take into account the total number of certificated employees who are employed by the District. It sets the proportion as nearly as practicable at the ratio which the certificated employee membership of each of the respective organizations bears to the total certificated employee membership of all such organizations.

"[2] Furthermore, while section 13087 contemplates that a public school employer may establish procedures for determining which of its certificated employees are members of one or more employee organizations, an election is not such a procedure. The procedure contemplated is merely one of ascertainment and verification. The term 'election' implies an ability to choose between two or more alternatives. Certificated employees who are members of an employee organization have no choice remaining open to them. Their membership in good standing in an employee organization must be accepted as a designation by them of that organization as authorized to represent them on a negotiating council. The formula of section 13085 for determining the entitlement of an employee organization to appoint members to a negotiating council requires only that those employees who are members of an employee organization may be counted. Under the Winton Act, an election is an inappropriate procedure to ascertain or verify membership in an employee organization." (emphasis by court; footnote omitted)

The court said that a reading of the Winton Act as a whole, although it does not define the word "member" as applied to an "employee organization" representing certificated employees, clearly indicates that "member" is used in its normally accepted sense and is to be given its ordinary and usual meaning of a certificated employee who joins an employee organization representing certificated employees. The court declared that "the formula for a certificated employee organization's entitlement to appoint members on the negotiating council would be entirely frustrated if employees who are members of a certificated employee organization were determined by the suggested election rather than by 'membership in good standing.'" (254 A.C.A. 708, 717; emphasis by court.)

The court concluded its opinion as follows (254 A.C.A. 708, 719-720):

"The Federation also argues that the Board may lawfully provide for an election among its teachers to determine their choice of organizations to represent them on the negotiating council as the Winton Act was designed to adopt for public school employees collective bargaining devices long accepted in the field of private employment. As indicated above, section 13088, like its 1961 predecessor (Gov.Code, § 3509), expressly provides that section 923 of the Labor Code does not apply to public school employees. [8] Even in the absence of such a provision, it is well settled that by enacting section 923 of the Labor Code, the Legislature did not intend to extend to public employment the collective bargaining procedures and devices applicable to private employment. (Nutter v. City of Santa Monica, 74 Cal. App.2d 292, 296-301 [168 P.2d 741]; Los Angeles Met. Transit Authority v. Brotherhood of R. R. Trainmen, 54 Cal.2d 684 [8 Cal. Rptr. 1, 355 P.2d 905]).

"The legislative history of the Winton Act indicates that on May 6, 1965, the Assembly flatly rejected two amendments substituting the collective bargaining procedures applied in private employment. Thus, the conclusion is inescapable that the Legislature intended to bar representational elections from the field of public school employment and expressly rejected the collective bargaining approach of having a single employee organization represent all certificated employees.

"[1b] In view of the above, we conclude that the election envisioned by the Board's resolution was contrary to and in conflict with the clear provisions of the Winton Act. As the governing body of a school district has no authority to enact a rule or regulation that alters the terms of a legislative enactment (Renken v. Compton City School Dist., 207 Cal. App.2d 106, 114 [24 Cal. Rptr. 347]), the court below properly granted the relief requested by the Association." (footnotes omitted)

It is not yet known whether the Supreme Court of California will grant a hearing in this case.

THE OXNARD CASE

Filed earlier, on July 19, 1967, was the 87 page "Memorandum of Opinion" of the Superior Court for the County of Ventura in the case of California Federation of Teachers, AFL-CIO, et al., Petitioners, vs. Oxnard Elementary School, a School District, et al., Respondents; Oxnard Educators Association, an unincorporated association, et al., Intervenors, Ventura County Superior Court No. SP 45, 581.

In the Oxnard case, the California Federation of Teachers sued the Oxnard Elementary School District contending, among other things, that the District's policy regarding the negotiating council was in violation of the Winton Act and that the Winton Act was on many grounds unconstitutional and invalid. Among other things, it was contended that the respondent District should not recognize the Negotiating Council because it had only membership from California Teachers Association organizations and because it discriminated against the Oxnard Federation of Teachers affiliated with Petitioner California Federation of Teachers.

Regarding the Winton Act, the Judgment together with supporting Findings of Fact and Conclusions of Law, filed and entered on September 1, 1967, are attached hereto as exhibits. Particular attention is directed to paragraphs 4 to 9 of the Judgment.

The alternative writ of mandate was discharged and the petition for relief by injunction and by writ of mandate was denied by the Superior Court.

One alleged ground of invalidity of the Winton Act was that it provides differently for public school districts than for other local agencies of government. The trial court believed that legitimate and purposeful objectives were being sought by the Legislature which "expected that the employment of this medium for negotiation would effectuate a time saving to the employer in not having to meet and confer separately with two or more employee organizations; would also relieve the employer from having to deal with divergent viewpoints and to perform the difficult task of weighing and resolving interorganizational disputes (much of this would be resolved at the negotiating council level); would eliminate the possibility of an employer playing one organization off against another and coming up with nothing particularly constructive for the benefit of employees; and, finally, would better facilitate a continuing and result-securing course of conferring compared with what had been experienced in the past under the wide open negotiation program featured by occasional concentrated campaigns and confrontations generated for the purpose of achieving employment goals (the latter type of contacts would appear to be less conducive to harmony and success and more likely to be accompanied by conflict and proliferation)." (Pages 51 and 52 of typed Memorandum of Opinion, Oxnard case.)

The Opinion continues:

> "Little trouble is encountered in finding a proper basis for making a legitimate classification as between organizations of educational type employees in school districts (the constant element we deal with) and organizations of employees (which perforce would be of the non educational type) in public agencies of a non educational type. Such classification basis is very obvious in the area of negotiation on educational objectives and instructional programing (compulsory whether multiple employee organization exist or not; through negotiating council where multiple employee organization exist). The very subject matter makes the difference. The employee members of the latter type organizations are not engaged in the instructing of students and therefore would not be conferring on these subjects. * * *" (Page 53)

The court was satisfied that sufficient differences exist in the structure and operation of the respective type of public agencies involved (educational agencies versus non educational agencies) to support the classification. Traditionally educational organizations have received separate legislative treatment. (page 53)

In justifying a different and distinct statute for school districts as distinguished from the state colleges or the state university, the court said "There are many districts of varying size, with governing boards of varying composition as to education, training and experience as it relates to the difficult area of employer and employee problems. This feature does not pertain to the state university and state colleges. The school boards in the districts are elected for shorter terms and under circumstances where the grass root element is strong, whereas the Board of Regents for the state university system and the Board of Trustees for the state colleges are appointive and have longer terms (16 and 10 years), which allows for the designation of personnel from a specialized social and technical segment of the citizenry. * * *" (Page 58)

The court distinguishes the school district problems regarding educational policy and working conditions from the comparable problems of the state university and the state colleges. (Pages 58 to 60)

The court recognizes as a "privilege" within the concept of the privileges and immunities clauses of the Federal and California Constitutions, the right of a minority employee organization, where multiple employee organizations exist in the operation of a governmental agency, "to meet and confer directly with the employer and to put forward and seek acceptance of a program which the leaders of the employee organization (with likely the stamp of approval from the rank and file) believe will be most beneficial for the employees of the public agency." (Page 61) The court added" * * * as to compulsory negotiation of educational objectives and instructional programming, the privilege is that of the certificated employee organizations (the employer must confer with them; whereas with respect to negotiating directly ones own program with the employer instead of trying to get a negotiating council to put all or some of it forward, the privilege is with the employee organization which can deal directly.)" (Page 61) The comment should here be made that the employer school board may ask the employee organization to take the matter up with the district negotiating council.

The opinion intimates that the Legislature evidently has determined that the negotiating council concept is a middle ground between what the Judge has labeled for convenience "the wide open bargaining process and the exclusive bargaining process." It is considered to be an experiment in the area of employment relations as far as public school agencies are concerned, to ascertain whether there is a workable middle course. (Pages 61 and 62)

The Judge summarizes:

> " * * * In all probability the legislature took note of the fact that in allocating the experiment to the school districts those who would be involved in it and affected by it would be a group of well educated, sincerely motivated, and highly dedicated people working at modest salaries for one of the country's most essential causes, the education of youth. This selection, in a sense, is complimentary to such employers and to such employee organizations." (Page 63)

The Judge concludes that he "cannot say that the Winton Act is unconstitutional" (Page 63) and cannot say that for any of the reasons reviewed in the opinion "the Winton Act is so unworkable or so unfair or so infected by a combination of both those attributes that it should be declared invalid or a nullity by the Court." (Page 87)

The Judge in the Oxnard case acknowledges in his Memorandum of Opinion that the case will be appealed. As noted above, judgment was only recently entered on September 1, 1967.

In closing the discussion of the Winton Act, the summary evaluation made by Dr. Jack P. Crowther, Superintendent of Los Angeles City Schools, on the occasion of his recent General Staff Meeting held August 31, 1967, indicates that system's approach to the third school year of experience working with negotiating councils:

> "Next I would like to comment briefly on our Unified and College Negotiating Councils. As you will recall, enactment of the Winton Act in 1965 superimposed upon our existing organization a new avenue for communications with teacher organizations. In the two years since then there has been a continuous maturing process going on among all of us. There have been stormy sessions. There have been misunderstandings. But almost always these have ended in greater understanding, if not always agreement. I want to compliment the Negotiating Councils for having provided us with a realistic alternative to some of the extreme actions and crises being experienced in many other states. There will continue to be some lack of agreement at times, of course. But I have a realistic hope that whatever the issue, it will be approached in an attitude of mutual respect."